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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. ..... 71 - 358

UNITED STATES OF AMERICA *ex rel.* WILLIAM EPTON,

Petitioner,

—against—

ALBERT NENNA, WARDEN, MANHATTAN HOUSE OF DETENTION FOR MEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, William Epton, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed the order of the United States District Court for the Southern District of New York denying the petition of William Epton for a writ of habeas corpus.

Citations to Opinions Below

One opinion of Judge Marvin E. Frankel in the District Court is reported at 281 F.S. 388. The other opinion of Judge Frankel is unreported as is the opinion of the Circuit Court. The opinion of the New York Court of Appeals is reported in 19 N.Y.2d 496. All of these opinions are set out in Appendix A *infra* (1a-53a).

Jurisdiction

Jurisdiction of this Court is invoked under 28 U.S.C. §2254(1). The judgment of the Circuit Court was entered on June 30, 1971.

Questions Presented

Petitioner William Epton was indicted by the State of New York for the crimes of riot, conspiracy to riot, anarchy and conspiracy to advocate criminal anarchy. During the trial and at the end of the People's case, the court dismissed the substantive riot charge. The defendant was convicted on the other charges, conspiracy to riot, anarchy and conspiracy to advocate criminal anarchy, and given one year on each count to be served concurrently. The questions raised by his conviction are as follows:

1. Whether the New York grand jury which indicted the petitioner—a Negro, poor, and under 35 years of age—was illegally and unconstitutionally selected in violation of the petitioner's right to a fair trial under the Fifth, Sixth and Fourteenth Amendments.

2. Whether the New York Court of Appeals could constitutionally redefine and narrow the anarchy law after it had (with the sanction of this Court) definitively interpreted the statute more than 40 years earlier in *New York* v. *Gitlow*, 234 N.Y. 132 (1922), affd. 268 U.S. 652 (1925), and, without notice, apply it to Epton.

3. Whether, assuming *arguendo* that New York could reinterpret the anarchy statute, the new interpretation

remains unconstitutional because it declares illegal, speech that is protected by the First Amendment as interpreted contrariwise by this Court in *Brandenberg* v. *Ohio*, 395 U.S. 444 (1969) and *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967).

4. Whether Epton's conviction for conspiracy to riot violated his rights under the First Amendment because the overt acts alleged in the indictment and as to which evidence was adduced, were all constitutionally protected speech.

5. Whether the amendment by the trial court of the indictment at the close of the entire case on the conspiracy to riot count—which changed the meaning of the indictment from an accusation that Epton conspired to do acts which actually disturbed the peace, to an accusation that he conspired to do acts which showed that he intended to disturb the peace—deprived him of due process under the Fifth and Fourteenth Amendments.

6. Whether, assuming *arguendo* the validity of the conspiracy to riot count, this Court may yet now reach the constitutional validity of the anarchy counts in the light of this Court's ruling in *Benton* v. *Maryland*, 395 U.S. 784 (1969) on the issue of concurrent sentences—particularly where the substantive anarchy charge is a felony and the conspiracy to riot is a misdemeanor.

7. Whether there was any evidence at all that Epton advocated or conspired to advocate the overthrow of the government of the State of New York, or that he conspired with others to do acts which "disturbed the public peace."

Statutory Provisions Involved

The statutory and constitutional provisions directly involved in this petition are:

Former New York Judiciary Law §596 (concerning qualifications of grand jurors); former New York Penal Law §§160, 161 (anarchy), 580 (conspiracy), 2090 (riot).

Constitutional provisions including the First, Fifth, Sixth, and Fourteenth Amendments to the Constitution. The text of the enumerated sections of the New York law is set forth *in haec verba* in Appendix B *infra* (54a-57a).

Statement of the Case

Present Proceeding

Petitioner sought federal habeas corpus relief from his conviction in the New York State Court in Manhattan of anarchy, conspiracy to advocate criminal anarchy and conspiracy to riot in January 1966 under "old" New York Penal Law §§160, 161, 580, 2090[1] and his sentence of one year in the City Penitentiary on each of the three counts to be served concurrently. Petitioner has been free on $25,000.00 bail since March of 1966 with the exception of two weeks in February 1968 while Judge Frankel considered the substantiality of the issues and the appropriateness of bail pending this proceeding (281 F.S. 388). The Court of Appeals has continued the bail and stayed the remittitur until final disposition by this Court. Epton has six months to serve in the City Penitentiary on the concurrent sentences.

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[1] These sections were all repealed by the recodification of the penal law passed by the New York State Legislature on July 20, 1965, effective September 1, 1967.

The Evidence

Judge Feinberg, for the court below, stated the facts to be as follows:

> "Epton's convictions were based upon his activities about the time of the 1964 Harlem riot. That riot began two days after a 15-year old Negro boy was shot and killed by an off-duty white New York Policeman. For some months previously, Epton, as leader of the Harlem branch of the Progressive Labor Movement (P.L.M.),[2] had been making an issue of what he characterized as the policy of brutality by the police against the black residents of Harlem. However, there was no evidence that Epton had any hand in the riots that broke out on the night of July 18. and the trial court dismissed that count of the four-count indictment that had charged Epton with riot in violation of former N. Y. Pen. Law §2090. Even so, Epton was by no means inactive in Harlem during this period. In speeches given on street corners and in the Harlem office of the P.L.M., in conversations with other members of P.L.M. and the public, and in leaflets and posters, Epton spoke out about the need of Harlem residents to organize for self-defense against the police. Without extensive quotation, it is enough to say that the tenor of Epton's remarks was violent at times and they could fairly be characterized as the now familiar militant-revolutionary rhetoric of black power advocates. At the same time, Epton was organizing a mass demonstration for Saturday, July 25, with the 32nd

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[2] "This is a self-described Marxist political organization. The Harlem branch in 1964 apparently had six members, including one police informer."

Police Precinct to be the objective of a march. Although petitioner's application for a demonstration permit was turned down, he went ahead with his plans. [The record shows that the application was for a "peaceful" demonstration with a view to presenting a list of demands to the government of the City of New York]. On July 25, after the rioting had subsided, Epton and a small group attempted to begin their planned march. Instead, Epton was arrested [for disorderly conduct, a charge later dismissed on motion of the District Attorney after his indictment. There was no evidence at the trial of any disturbance or illegal conduct of the defendant on July 25, the day of his arrest].

"Petitioner's conviction was affirmed in the New York State courts, *New York* v. *Epton,* 281 N.Y.S.2d 9 (1967), aff'g, 276 N.Y.S.2d 847 (App. Div. 1966). In the Supreme Court, Epton's petition for a writ of certiorari was denied, and his appeal was dismissed for want of a substantial federal question. 390 U.S. 29, rehearing denied, 390 U.S. 976 (1968), petition for leave to file petition for rehearing out of time denied, 398 U.S. 944 (1970)." [Text in brackets supplied] (2a-4a).

Background

The prosecution of Epton was in the van of a new cycle of prosecutions for anarchy and sedition brought by prosecutors in New York and other states against black citizens. Legal scholars as well as political scientists have been concerned with the New York Court of Appeals opinion affirming the conviction—the first conviction for anarchy in New York in 45 years and the first since that of Benjamin Gitlow in 1921 and its affirmance in this court in 1925. [See "Black

Power Advocacy: Criminal Anarchy or Free Speech," 56 Calif. L. Rev. 702 (1968); "From Gitlow to Epton—New York's Resurrected Criminal Anarchy Statute—the First Amendment and National Policy," 16 New York Law Forum 93 (1970); "Clear and Present Danger Reexamined: Dissonance in the *Brandenberg* Concerto," 22 Stan. L. Rev. 1163, 1171 n. (1970); "Conspiracy and the First Amendment," 79 Yale L.J. 872, 892-894 n. (1970); "Notes on Epton," 19 Syracuse L.R. 130 (1967), 20 Syracuse L.R. 73 (1969)].

Grand Jury

Petitioner has raised in this proceeding the issue of the constitutional validity of the grand jury which indicted him. Although Epton had challenged the composition of the grand jury in pre-trial motions, a full scale hearing had been denied to him. Subsequent to his conviction, however, and the denial of a hearing to him in this Court, the selection process and the composition of that grand jury was judicially examined in a State Supreme Court hearing before Justice John Murtagh. That procedure and that very grand jury that had indicted Epton were approved by the New York Court of Appeals in *People* v. *Chestnut,* 26 N.Y.2d 841 (1970). That record and decision is now before this Court for review in this proceeding. It is also before this Court on a petition for certiorari in *United States ex rel. Chestnut et al.* v. *Criminal Court,* O.T. 1971 Misc. 156. When Epton originally filed his petition for *habeas corpus* in February 1968, the state proceeding in *Chestnut* was in process but undecided.

Opinions Below (Grand Jury)

Accordingly, Judge Frankel postponed his decision until the state proceedings in *Chestnut* were concluded, and finally denied the *habeas corpus* petition with evident ambivalence on October 5, 1970. This same ambivalence finds its expression in the affirmance of the Court of Appeals. Both opinions are in the nature of a court's petition for certiorari to this Court.

In his opinion, Judge Frankel considered "the most serious claim" to be that "the court should infer a pattern of unconstitutional discrimination from the low representation of black people and Puerto Ricans on the New York grand jury" (22a). Nonetheless, he found in accord with the state decision that there was "no showing of purposeful or intentional discrimination against any racial or ethnic group" (22a). Moreover, Judge Frankel accepted the reasoning of the State Court of Appeals in *Chestnut* and found that the system of volunteer grand-jury service—which concededly resulted in *de facto* discrimination on racial, economic, and age lines—was rationally justifiable (23a).

The record of the hearing before Justice Murtagh in *Chestnut* was clear. Prospective grand jurors were chosen by lot from a larger petit jury list; this chance-selected list was then screened by the county clerk; those selected by him were given the option (not available to petit jurors who must serve) of serving on the grand jury. The Legislature at that time and until September 1967, required that the prospective grand juror or his spouse possess assets worth $250.00. Quite apart from this requirement, figures showed that persons of low income were under-represented in the grand-juror rolls—persons who were "blue collar"

workers comprised 47 per cent of the population, but only 1.14 per cent were so identifiable on the grand jury list—and that all persons on welfare were excluded.

The statute further set age limits for service at 21 and 70 years of age. Administration of the statute as to the age requirement, however, excluded persons between the ages of 21 and 35. Although census figures showed the population over 21 to be 24 per cent Negro and 9 per cent Puerto Rican, the grand juror rolls listed only 1.65 per cent Negroes and .03 per cent Puerto Ricans.

At the time of his indictment in 1964, Epton, a Harlem Negro, was 32 years of age and had an income of $20.00 a week. Discrimination against Negroes, the young and the poor thus clearly deprived Epton of a grand jury of his peers—meaning here, persons selected as a fair and representative cross section of persons in his community.

Ruling Below (Anarchy)

As to the anarchy and conspiracy to advocate anarchy counts, the trial judge conceded that *Gitlow* was no longer the law. Accordingly, he attempted to innovate appropriate instructions to the jury from subsequent (to *Gitlow*) opinions of this Court which interpreted (not state sedition laws, but) the *Smith Act* (federal legislation). In so doing, the trial judge changed the law as understood and accepted prior to the Epton indictment in the hope that the new interpretation would pass scrutiny in this Court. Reading in *haec verba* from the statutes the wording of which he conceded was unconstitutional (P.L. §§160, 161), he nonetheless instructed the jury that the defendant's intent rather than his actions were pivotal and that speech itself could

constitute a sufficient overt act to support a conspiracy conviction, whether for anarchy or riot. Nor did he instruct the jury that it had to find such speech connected to any "clear and present danger" of evil consequences the legislature sought to prevent. Anticipating a constitutional challenge to the anarchy statute, the trial judge sentenced Epton to no more than one year on the anarchy count (which carried a maximum of seven years) to run concurrently with the other conspiracy counts (misdemeanors with a maximum of one year) in evident expectation that the conspiracy to riot count would stand and further review would be barred by the doctrine of concurrent sentence.

Ruling and Opinions Below (Riot)

There was no evidence connecting the defendant's speech or pamphleteering to any violence or disturbance of the peace on the days of the Harlem riot. At the conclusion of the prosecution's case, the trial judge conceded that there was no evidence to connect Epton to riot as defined by law.[3] The court, accordingly, dismissed the riot count against Epton.

At the conclusion of the entire case, the court had to face the same issue again because the conspiracy to riot count was drafted in language identical to that of the riot count. The grand jury had charged Epton with conspiring with others to participate in a riot by doing acts "which disturbed the public peace by using force and violence to

[3] Penal Law §2090 defined the crime as follows: "Whenever three or more persons, having assembled for using force or violence to any other person, or to property or threaten or attempt to commit such disturbance, or to do an unlawful act by the use of force or violence, accompanied with the power of immediate execution of such threat or attempt, they are guilty of a riot."

police officers of the City of New York." To circumvent this conclusion in the defendant's favor, the trial judge amended the indictment;[4] in his own words, he did so in order that it make "sense." He changed the crucial word in the indictment, the verb, from the past indicative "disturbed" to the future subjunctive "would disturb." Epton was thus charged (immediately before the case went to the jury) with a crime not of action but of intention. The jury could then look to his speech (characterized by Judge Feinberg as "the now familiar militant-revolutionary rhetoric of black power advocates") and calculate that, even if there was no conspiracy which resulted in the disturbance of the peace which was the crime (and the only crime in that count) charged, it was enough for a finding of guilt if the defendant intended, desired, or would be pleased with a disturbance of the peace. The court below said of this "Johnny come lately" amendment:

> "The amendment was a minor change of grammatical tense and clarified the issue for the jury" (11a).

The amendment certainly "clarified" the issue in that it permitted and suggested a verdict of guilt to the jury which was freed by the new language to turn from consideration of objective evidence to speculation about the defendant's subjective intent, with his public speech and pamphleteering presumably supplying the overt evidence thereof, even though it is a question whether speech and writing are legally sufficient to constitute overt acts to support such a criminal conspiracy.

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[4] A copy of the indictment is set forth in Appendix C, *infra* (58a-64a).

Reasons for Granting the Writ

1. The court below and the New York Court of Appeals have decided (with regard to the grand jury) a federal question of substance in a way not in accord with the applicable decisions of this Court.

As set forth in detail in the petition for certiorari in *United States ex rel. Chestnut* v. *Criminal Court,* O.T. 1971 Misc. 156 the grand jury which indicted Epton, a poor, young Negro, was a jury of predominantly rich, old, white citizens not a cross section of the community where he lived —chosen to serve as volunteers in determining probable cause for the issuance of an indictment. It was a grand jury which the *Chestnut* record showed was unrepresentative of the population in New York under circumstances which had existed for a sufficiently long period of time for notice of its unconstitutional character to be imputed to the authorities, and of which situation there was testimony that there was actual knowledge. *Strauder* v. *West Virginia,* 100 U.S. 303 (1880); *Hernandez* v. *Texas,* 347 U.S. 475 (1954); *Wood* v. *Georgia,* 370 U.S. 375 (1962); *Williams* v. *Florida,* 399 U.S. 78 (1970); *Duncan* v. *Louisiana,* 391 U.S. 145 (1968).

The court below did not discuss this issue as it held itself bound by *United States ex rel. Chestnut* v. *Criminal Court,* slip opinion 2891 (May 5, 1971) and the District Court ruled against petitioner on the grounds of *People* v. *Chestnut,* 26 N.Y.2d 481 (1970) (4a). It was undisputed, however, at the time of the indictment in 1964 and the superseding indictment that the membership of the grand jury was not representative of the New York City population and

was chosen by procedures that discriminated against the non-white, the poor and the young.

The grand jury issue, as developed in the *Chestnut* record and the propriety of which was approved by the State Court of Appeals in 1970 is newly presented to this Court at this time.

2. The validation of Epton's conviction violated principles of due process long established by this Court requiring in all criminal cases that the defendant have notice that the conduct he engages in is proscribed by law. *Cole* v. *Arkansas,* 333 U.S. 196 (1948); *In re Oliver,* 333 U.S. 257 (1948).

Epton had a right, prior to his indictment, to rely on the interpretation of the New York anarchy law by the State's highest court and by this Court in *People* v. *Gitlow,* 234 N.Y. 132 (1922); *Gitlow* v. *New York,* 268 U.S. 652 (1925) and on the doubt cast on that law in *Dennis* v. *United States,* 341 U.S. 494, 507 (1951). He could not be bound to anticipate the innovative interpretation of the State Court of Appeals in *Epton* prior to its declaration in 1967.

Subsequent to its ruling in *Epton* (390 U.S. 29), this Court met squarely the issue posed by petitioner who claimed that the reinterpretation of the anarchy statute after his indictment and conviction was *ex post facto* as to him. In *Shuttlesworth* v. *Birmingham,* 394 U.S. 147 (1969), this Court invalidated a conviction under a state statute which it held to be unconstitutional under the First Amendment even though a later narrowing judicial interpretation would have passed "constitutional muster." Cf. *Bouie* v. *City of Columbia,* 378 U.S. 78 (1935).

The court below considered this and other related questions to be substantial but held (as did the District Court) it was not free to rule on such issues here in view of this Court's action on a prior petition for certiorari and appeal in this case [390 U.S. 29 (1968)]. Moreover, in view of the substantiality of this issue and others, said the court below, this Court is the appropriate tribunal to decide the issue (7a).

3. Since the attempt to bring this case to this Court on direct appeal and the denial of that appeal and the companion petition for certiorari, this Court has made certain judicial rulings which place the case at bar in a different posture from its posture at the time *Epton* was first turned down by this Court, and accordingly, the law established below is now clearly at variance with decisions of this Court.

The New York Court of Appeals opinion was at variance with this Court's opinion in *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967) which certainly seemed to hold New York Penal Law §§ 160 and 161 as written, unconstitutionally void for vagueness. This holding was to be further supported in *Brandenberg* v. *Ohio*, 395 U.S. 444 (1969) where this Court declared unconstitutional a sedition statute, the wording of which was similar to the New York anarchy statute, on the grounds that the statute violated the First and Fourteenth Amendments. In addition, this Court overruled *Whitney* v. *California*, 274 U.S. 357 (1927). *Whitney* and *Gitlow* have been, through the years, considered as parallel cases by this Court. These considerations, however, were deemed unavailable for judicial review in 1968 by at least one Justice of this Court who was disturbed by the

concurrent sentence doctrine expounded in *Lanza* v. *United States,* 370 U.S. 139 (1962) and *Hirabayashi* v. *United States,* 320 U.S. 81 (1943) which doctrine was at least modified, if not overruled in *Benton* v. *Maryland,* 395 U.S. 784 (1969). This Court further, after three arguments in *Samuels* v. *Mackell,* 401 U.S. 66 (1971) did not reach the merits as to the constitutionality of the New York anarchy law. Moreover, this Court in *Samuels* explicitly did not approve the upholding of the anarchy law by the specially convened three judge court below which cited with approval the state Court of Appeals ruling in *Epton* [388 F.S. 348 (S.D.N.Y. 1968)].

The court below considered that this issue should be decided by this Court (7a).

4. Epton's conviction supported in the record by acts of speech only, raises profound issues under the First Amendment not yet decided by this Court.

The analysis of the facts by the court below sheds new light on the contentions of Epton that all the conduct charged as illegal involved speech and expression of ideas and that the proscription of such expression in the absence of any showing (and there was none) of a "clear and present danger" of the evil the legislature had a right to proscribe, invalidated Epton's conviction. *Brandenberg* v. *Ohio,* 395 U.S. 444, 447 (1968); *New York Times* v. *Sullivan,* 376 U.S. 254 (1964). In this connection, the court below underlined the issue that two of Epton's convictions were for conspiracy (to riot and to advocate anarchy) and that at least some (Epton contended all) of the overt acts charged involved speech protected by the First Amendment.

The court below affirmed the District Court, which held that the talk of petitioner in the context of the 1964 Harlem riots met the "clear and present danger" test. The court therewith affirmed the District Court's ruling that certain kinds of speech are not necessarily constitutionally protected. It recognized, however, that the issue is substantive and said if *Yates* v. *United States,* 354 U.S. 298 (1951) "does not now govern this issue, it is for [this] Court rather than for an inferior federal court, to say so" (11a).

It held further, that petitioner could not on this appeal raise the issue whether the jury had been warned against convicting Epton solely on constitutionally protected overt acts, *i.e.* speech, because the issue had not been briefed in the prior proceedings (8a). In this connection, the court conceded that Epton had always maintained, throughout various court proceedings, that his prosecution violated the First Amendment and had specifically excepted to the trial judge's reinstruction of the jury that an act of speech was a sufficient overt act to support conviction (8a). The ruling of the courts below surely constitutes a novel and dangerous (to First Amendment rights) extension of the "clear and present danger" doctrine and, as such, calls for review by this Court.

5. The amendment of the indictment by the trial court at the end of the entire case on the conspiracy to riot count is repugnant to due process as denying notice of the charge against the defendant prior to his trial. It is further inconsistent with decisions of this Court and of the courts of New York State. *Ex parte Bain,* 121 U.S. 1 (1887); *Stirone* v. *United States,* 361 U.S. 212 (1959); *People* v. *Ercole,* 308 N.Y. 432 (1955) reh. den. 308 N.Y. 1007.

The court below held that the change and amendment was insignificant since Epton "could have been convicted of conspiracy to riot whether or not the substantive offense which was the object of the conspiracy was completed," notwithstanding the dismissal of the trial court of the substantive offense similarly worded (11a). The trial court dismissed the riot count because of a complete failure of evidence. But when at the end of the case, the court amended the conspiracy count, it said it was necessary to do so in order for the indictment to make "sense" in the context of this radical change in the posture of the prosecution's case.

6. When this case was before this Court in 1967-1968, the doctrine of concurrent sentence might well have barred review of the anarchy counts if the assumption were made that the petitioner was validly convicted under the conspiracy to riot count. Petitioner was sentenced to one year in prison on the conspiracy to riot charge, a misdemeanor, and to a concurrent sentence on both the anarchy (a felony) and the conspiracy to advocate criminal anarchy (also a misdemeanor).

In *Benton* v. *Maryland,* 395 U.S. 784 (1969), this Court reached an issue involving a concurrent sentence and held that a valid conviction on one count would not bar review of another, although the sentences were concurrent. Thus, now this Court may appropriately reach for decision the anarchy counts, upholding the conspiracy to riot count [despite petitioner's vigorous challenge thereto] and vice versa.

The court below conceded that the *Benton* holding came after this Court's ruling dismissing the appeal and deny-

ing certiorari [390 U.S. 29 (1968)], but said again that the issue was appropriate for decision by this Court (7a).

7. The record is bare of any evidence that petitioner advocated or conspired to advocate the overthrow of the government of the State of New York. There was no evidence of petitioner's advocacy being directed against the State of New York nor of the likelihood that the government of the State of New York would fall ("clear and present danger"). There was further no evidence that his acts, in concert, or otherwise, disturbed the peace as the indictment originally read.

Thus, under the holding in *Thompson* v. *City of Louisville,* 362 U.S. 199, 206 (1960) and *Gregory* v. *Chicago,* 394 U.S. 111, 112 (1969), a conviction in the absence of evidence to support it represents a denial of due process of law. The court below did not discuss this issue.

CONCLUSION

The importance of all the issues, involving as they do basic constitutional rights, requires a hearing of the case by this Court. Both courts below thought the issues substantial and explicitly stated that they were appropriate for review by this Court at this time.

The petition for certiorari should be granted.

Dated: New York, New York
August, 1971

Respectfully submitted,

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APPENDIX A-1

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 459—September Term, 1970.

(Argued December 11, 1970 Decided June 30, 1971.)

Docket No. 35559

UNITED STATES OF AMERICA *ex rel.* WILLIAM EPTON,

Petitioner-Appellant,

—against—

ALBERT NENNA, Warden, Manhattan House of Detention for Men,

Respondent-Appellee.

Before:

LUMBARD and FEINBERG, *Circuit Judges,* and CLARIE, *District Judge.**

Appeal from order of the United States District Court for the Southern District of New York, Marvin E. Frankel, *J.*, denying petition for writ of habeas corpus. Affirmed.

ELEANOR JACKSON PIEL, New York, N. Y. (Melvin L. Wulf, American Civil Liberties Union; Paul Chevigny, New York Civil Liberties Union, on the brief), *for Petitioner-Appellant.*

* Of the District of Connecticut, sitting by designation.

DAVID OTIS FULLER, JR., Assistant District Attorney (Frank S. Hogan, District Attorney, New York County; Michael R. Juviler, Assistant District Attorney, on the brief), *for Respondent-Appellee.*

FEINBERG, *Circuit Judge*:

William Epton appeals from an order of the United States District Court for the Southern District of New York, Marvin E. Frankel, *J.*, denying his petition for a writ of habeas corpus. After a jury trial in the New York State courts, petitioner was convicted in 1966 of criminal anarchy, former N.Y. Pen. Law §§160, 161,[1] conspiracy to advocate criminal anarchy, former N.Y. Pen. Law §§160, 161, 580, and conspiracy to commit riot, former N.Y. Pen. Law §§580, 2090. He was sentenced to three concurrent one-year terms in the city penitentiary. Judge Frankel's opinion, 318 F. Supp. 899, carefully considered petitioner's major arguments and adequately set forth the reasons why habeas relief was denied. Our consideration of the merits of petitioner's most substantial claims is foreclosed both by a recent decision of this court and by the Supreme Court ruling in Epton's prior direct appeal to it. As to the other issues raised before us, we affirm the district court essentially for the reasons stated in its opinion.

Without repeating Judge Frankel's efforts, some background would be helpful. Epton's convictions were based upon his activities about the time of the 1964 Harlem riot. That riot began two days after a 15-year old Negro boy was shot and killed by an off-duty white New York police-

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1 Since Epton's indictment, the New York penal law has been amended. This opinion will refer to the earlier law, under which Epton was tried, as "former N.Y. Pen. Law §——."

man. For some months previously, Epton, as leader of the Harlem branch of the Progressive Labor Movement (P.L.M.),[2] had been making an issue of what he characterized as the policy of brutality by the police against the black residents of Harlem. However, there was no evidence that Epton had any hand in the riots that broke out on the night of July 18, and the trial court dismissed that count of the four-count indictment that had charged Epton with riot in violation of former N.Y. Pen. Law §2090. Even so, Epton was by no means inactive in Harlem during this period. In speeches given on street corners and in the Harlem office of the P.L.M., in conversations with other members of P.L.M. and the public, and in leaflets and posters, Epton spoke out about the need of Harlem residents to organize for self-defense against the police. Without extensive quotation, it is enough to say that the tenor of Epton's remarks was violent at times and they could fairly be characterized as the now familiar militant-revolutionary rhetoric of black power advocates. At the same time, Epton was organizing a mass demonstration for Saturday, July 25, with the 32nd Police Precinct to be the objective of a march. Although petitioner's application for a demonstration permit was turned down, he went ahead with his plans. On July 25, after the rioting had subsided, Epton and a small group attempted to begin their planned march. Instead, Epton was arrested.

Petitioner's conviction was affirmed in the New York State courts. *New York* v. *Epton,* 281 N.Y.S.2d 9 (1967), aff'g, 276 N.Y.S.2d 847 (App. Div. 1966). In the Supreme Court, Epton's petition for a writ of certiorari was denied,

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2 This is a self-described Marxist political organization. The Harlem branch in 1964 apparently had six members, including one police informer.

and his appeal was dismissed for want of a substantial federal question. 390 U.S. 29, rehearing denied, 390 U.S. 976 (1968), petition for leave to file petition for rehearing out of time denied, 398 U.S. 944 (1970).[3]

I.

As already indicated, several of the issues before us do not require extended discussion by this court. The first of these is the argument that Epton was indicted in violation of his constitutional rights because the members of the New York grand jury were selected under a system that discriminated as to race, wealth and age. The district court, and the parties in their briefs in this court, apparently considered this to be the most significant question in the case. However, our consideration of the issue is sharply limited by intervening precedent. Since the decision of the district court in favor of the State on the issue and since the argument of this appeal, this court has ruled, in *United States ex rel. Chestnut* v. *Criminal Court,* slip op. 2891 (May 5, 1971), that the grand jury that indicted Epton was not unconstitutionally selected. Epton raises "the same arguments"[4] that were rejected by this court in *Chestnut.* We, therefore, affirm on this issue.

The other issues that require only brief discussion are those that raise the constitutionality of the New York anarchy law under which Epton was convicted.[5] As we understand appellant's brief, his arguments include the

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3 For a further exposition of the procedural history of this case, see 318 F. Supp. at 901-902.

4 See *People* v. *Chestnut,* 311 N.Y.S.2d 853, 855 n. 1 (1970).

5 In response to *Pennsylvania* v. *Nelson,* 350 U.S. 497 (1956), New York has since amended its anarchy statute so that it applies only to the advocacy of the overthrow by force or violence of the New York State government. N.Y. Pen. Law §240.15, eff. Sept. 1, 1967.

following: (1) the New York Court of Appeals could not constitutionally redefine and narrow the anarchy law in Epton's appeal, 281 N.Y.S.2d 9 (1967), after it had definitively interpreted the statute over 40 years earlier in *New York* v. *Gitlow,* 234 N.Y. 132 (1922), aff'd, 268 U.S. 652 (1925); (2) even if the New York court could reinterpret the statute, the new interpretation remains unconstitutional because it declares illegal speech that is protected by the first amendment, citing, e.g., *Brandenberg* v. *Ohio,* 395 U.S. 444 (1969); *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967); and, (3) even if the new interpretation of the anarchy statute is constitutional, applying it to Epton violates the due process requirement of adequate notice because Epton could reasonably have expected, in light of modern constitutional law, that a state anarchy statute which had not been invoked since the *Gitlow* prosecution in 1921 was moribund, citing, e.g., *Shuttlesworth* v. *Birmingham,* 394 U.S. 147 (1969); *Bouie* v. *City of Columbia,* 378 U.S. 347 (1964).

These questions are very substantial,[6] but we do not believe that we are free to rule on them in this case. The district court reasoned that the Supreme Court had either decided them or had held that they should not be reached and that this was binding on a lower court under the doctrine of law of the case. *Briggs* v. *Pennsylvania R.R.,* 334 U.S. 304 (1948); *Ex Parte Sibbald* v. *United States,* 37 U.S. 488 (1838); see *Banco Nacional de Cuba* v. *Farr,* 383 F.2d 166, 177-78 (2d Cir. 1967), cert. denied, 390 U.S. 956 (1968). We agree. As noted above, the Supreme Court

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6 Cf. *Samuels* v. *Mackell,* 388 F. Supp. 348 (S.D.N.Y. 1968) (three-judge court), aff'd 401 U.S. 66 (1971) (affirmed "solely on the ground that, in the appropriate exercise of the court's discretion, relief by way of declaratory judgment should have been denied without consideration of the merits." 401 U.S. at 73).

dismissed Epton's appeal from the New York decision for want of a substantial federal question, 390 U.S. 29 (1968), and this is a decision on the merits[7] of those issues raised on appeal.[8] While it is not altogether clear, the Court's dismissal was based either on an affirmance of the ruling of the New York Court of Appeals on the substantive issues, or, as indicated in the concurrence of Justice Stewart, *id.*, and the dissent of Justice Douglas, *id.* at 30,[9] on the concurrent sentence doctrine, citing *Lanza* v. *New York*, 370 U.S. 139 (1962); *Hirabayashi* v. *United States*, 320 U.S. 81 (1943).

Petitioner argues that because of recent changes in the concurrent sentence doctrine we should examine the constitutionality of the anarchy law. Citing *Benton* v. *Maryland*, 395 U.S. 784 (1969), he claims that the doctrine no longer states a jurisdictional rule. That may be so, but we are not persuaded to reverse the district court. First, *Benton* does not answer the first branch of the law of the case problem here, i.e., that the Supreme Court considered and summarily affirmed the rulings of the New York Court of Appeals. Second, *Benton* indicates that the concurrent

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7 For the "lively disagreement among respected constitutional scholars concerning the significance of the Supreme Court's dismissal of an appeal," see the authorities collected by Judge Frankel, 318 F. Supp. at 906 n. 8.

8 Although he did not discuss the question, apparently Judge Frankel believed that not only the three issues set forth in the text but also two others, i.e., whether the convictions violated due process because there was no evidence that petitioner advocated the overthrow of the State government and whether the trial court's charge met the requirements of the first amendment, were raised on appeal to the Supreme Court. 28 U.S.C. §1257. We agree. See *Fiske* v. *Kansas*, 274 U.S. 380, 385 (1927); *Dahnke-Walker Co.* v. *Bondurant*, 257 U.S. 282, 288-89 (1921).

9 Petitioner also refers to a memorandum of Mr. Justice Harlan concerning his bail application quoted in a letter, dated June 5, 1967, from the Clerk of the Supreme Court to Mrs. Eleanor J. Piel, petitioner's attorney.

sentence doctrine may still exist as a discretionary rule of convenience, 395 U.S. at 791, and we have so assumed. See *United States* v. *Febre*, 425 F.2d 107, 113 (2d Cir.), cert. denied, 400 U.S. 849 (1970); *United States ex rel. Weems* v. *Follette*, 414 F.2d 417 (2d Cir. 1969), cert. denied, 397 U.S. 950 (1970). But, as correctly noted by Judge Frankel, such discretion in this case is properly not ours to exercise but rather the Supreme Court's.[10] Accordingly, except for the issues considered in Part II, infra, we do not pass upon the merits of appellant's constitutional arguments. In light of the substantiality of some of those contentions, we are comforted in the thought that if our deference to the prior Supreme Court ruling in this case is undue, that tribunal—to which appellants may obviously apply—is the proper forum to so decide.

II.

Of course, we are not similarly foreclosed from considering the questions which could properly have been raised only by petition for a writ of certiorari. *Brown* v. *Allen*, 344 U.S. 443, 497 (1953) (separate concurrence by Mr. Justice Frankfurter). And to those issues we now turn.

Epton's first and most substantial argument is that his conviction for conspiracy to riot violated his rights under the first amendment because the overt acts alleged in the indictment were all constitutionally protected speech and, even if some were unprotected, because the trial judge did not instruct the jury that they could only convict as to those. On the first phase of this argument the district court ruled that the overt acts central to the State's case were outside the sphere of the first amendment. The court

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10 This result might be different if we reversed Epton's conviction on the conspiracy to riot count. But, as explained in Part II, *infra*, we affirm Judge Frankel's opinion as to that issue also.

reasoned that in the context of the 1964 Harlem riots "talk of terror, killing and warfare was 'advocacy of the use of force or of law violation . . . directed to inciting or producing imminent lawless action . . . and likely to incite or produce such action.'" 318 F. Supp. at 909, quoting *Brandenburg* v. *Ohio,* 395 U.S. 444, 447 (1968).

Judge Frankel also concluded that it was not constitutional error for the trial judge to fail to caution the jury against convicting solely on constitutionally protected overt acts because petitioner did not claim that such a request was made. Nor had he made that claim in his brief to the New York Court of Appeals or in his petition for a writ of certiorari or his jurisdictional statement. In addition, the district court believed that the jury would not have convicted Epton "unless it had focussed precisely on the . . . evidence of unprotected overt acts." 318 F. Supp. at 909.

Petitioner does not argue here that he made a specific request for a limiting instruction as to the conspiracy to riot count. Rather he claims that the issue was preserved by his general objection that the entire prosecution violated his first amendment rights and by his specific objection to the trial judge's reinstruction of the jury after they had requested additional instruction on other counts, those that charged criminal anarchy and conspiracy to advocate criminal anarchy.[11] Whether or not this oblique objection preserved petitioner's claim, we agree with the district court's ultimate conclusions on these issues.

The argument that all the overt acts were constitutionally protected speech simply ignores substantial portions of the evidence. Among the acts alleged to be in further-

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11 Of the 25 overt acts alleged in this count, 15 were identical to the overt acts alleged under the conspiracy to riot count.

ance of the conspiracy to riot were that Epton "discussed starting disturbances in Brooklyn," that Epton "discussed the use of Molotov cocktails," and that he made a speech in which he "discussed the killing of cops and judges." There was evidence to support a jury finding that each of these overt acts had in fact occurred, and we do not see why they are necessarily constitutionally protected in the sense appellant puts to us. If the position is taken that any speech is so protected, merely because words have been spoken to communicate ideas, the position is wrong. Clearly a charge of conspiring to violate the narcotics laws could be proved by evidence that one of the overt acts was a "discussion" among the conspirators. Cf. *New York State Broadcasters Ass'n* v. *United States*, 414 F.2d 990, 996-97 (2d Cir. 1969), cert. denied, 396 U.S. 1061 (1970). If the point is that Epton's words were publicly proclaimed to further a political view and were therefore protected, the answer is that this is an inaccurate description of the first two examples given above, which were private conversations. It is true that the third overt act occurred in a speech in which Epton did tell an audience in this tense period:

> They [the cops] declared war on us and we should declare war on them and every time they kill one of us damn it, we'll kill one of them and we should start thinking that way right now . . . because we had better stop talking about violence as a dirty word . . . .

We have great difficulty with the view that it is improper to use this language as proof of an overt act in furtherance of a conspiracy to riot.[12]

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12 In his opinion concurring in the dismissal of Epton's prior appeal to the Supreme Court, Justice Stewart noted:

(*footnote continued on next page*)

Moreover, it must be remembered that Epton was convicted of conspiracy in this case, the essence of which is an agreement to do an unlawful act, the crime of riot. Under New York law, the State need only prove the agreement and one overt act in furtherance of the agreement. Former N. Y. Pen. Law §§580, 583.[13] In *Yates* v. *United States,* 354 U.S. 298 (1957), the only overt acts proved at trial were constitutionally protected speech, two public meetings. Nevertheless, the Court held that on retrial these would be sufficient overt acts and stated, 354 U.S. at 334:

> It is not necessary that an overt act be the substantive crime charged in the indictment as the object of the conspiracy. . . . Nor, indeed, need such an act, taken by itself, even be criminal in character. The function of the overt act in a conspiracy prosecution is simply to manifest "that the conspiracy is at work," *Carlson* v. *United States,* 187 F.2d 366, 370 [(10th Cir. 1951)], and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence. [Other citations omitted.]

Under this reasoning, it is not the "speech" that is made criminal, but rather the agreement, and whether the overt

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> But the State in these cases presented proof that Epton had actively participated in the formation of a group dedicated to armed revolt against the police under the direction of "block captains" and with the assistance of "terrorist bands," equipped with Molotov cocktails that Epton himself had explained how to use. In the context of this record, activities such as these can make no serious claim to constitutional protection.
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> 390 U.S. at 29-30 n. †.

13 Present New York law is similar. See N.Y. Pen. Law §§105.00-105.20.

act is constitutionally protected speech would be irrelevant. We recognize that the question is a substantial one. Justices Black and Douglas dissented on this issue in *Yates*. In Epton's prior appeal to the Supreme Court, Justice Douglas dissented from dismissal of Epton's appeal on the same ground, 390 U.S. at 33. And Justice Stewart, while concurring in the dismissal, agreed that:

> [I]t is at least arguable that a State cannot convict a man of criminal conspiracy without first demonstrating some constitutionally unprotected overt act in furtherance of the alleged unlawful agreement.

390 U.S. at 29-30 n. 1. But we do not think we should ignore what appears to be the meaning of the most relevant Supreme Court precedent. If *Yates* does not now govern this issue, it is for that court, rather than for an inferior federal court, to say so.

Petitioner's second argument is that an amendment to the same count of the indictment (conspiracy to riot) deprived him of due process under the fourteenth and fifth amendments. The indictment alleged that Epton conspired with others to "agree to participate in a riot" by "promoting . . . an assembly of more than three persons which disturbed the public peace." The amendment changed the last five words to "which would disturb the public peace." As noted above, the count charged Epton with conspiracy and he could have been convicted of that whether or not the substantive offense which was the object of the conspiracy was completed. Cf. *Pinkerton* v. *United States*, 328 U.S. 640 (1946). The amendment was a minor change of grammatical tense and clarified the issue for the jury. Cf. *United States* v. *Caine*, slip op. 2591 (2d Cir. Apr. 27, 1971). Even if the indictment had not been clarified, Epton

could properly have been convicted of conspiracy.[14] We agree with Judge Frankel that the action of the state judge was not constitutionally impermissible.

Appellant's last argument need not be discussed with particularity. He alleges that certain rulings of the trial court and actions of the prosecutor were prejudicial and deprived him of a fair trial. The issue before us is not whether error was committed, but whether these rulings, singly or together, rendered the trial so unfair as to deny appellant due process, thereby raising a federal constitutional question. See *Schaefer* v. *Leone,* slip op. 3133 (2d Cir. May 24, 1971); *United States ex rel. Cannon* v. *Maroney,* 373 F.2d 908 (3d Cir. 1967). We have considered appellant's argument and conclude that due process was not denied.

Accordingly, we affirm the district court's order denying Epton's petition for the writ of habeas corpus.

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14 Of course, well before this ruling was made, the substantive charge of riot against Epton had already been dismissed by the trial judge, thereby eliminating any confusion of the issue submitted to the jury on the conspiracy to riot count.

APPENDIX A-2

Opinion of Frankel, *D.J.* Re Bail

[Filed February 15, 1968]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM

68 Civ. 461

UNITED STATES OF AMERICA *ex rel.* WILLIAM EPTON,

Petitioner,

—against—

ALBERT NENNA, Warden,
Manhattan House of Detention for Men,

Respondent.

FRANKEL, *D.J.*

The petition for habeas corpus raises complex and difficult questions of due process in both the procedural and the substantive meanings of the constitutional phrase. To mention only the problem which has caused particular concern at the outset of this proceeding, there is a sweeping attack upon the composition of the grand jury which indicted petitioner, implicating both the adequacy of the governing state statutes on their face and the application of the statutes in the circumstances of this case. There are, in

addition, questions under the First Amendment (as it applies to the States through the Fourteenth) which led one Justice of the Supreme Court to file a dissent from the denial of certiorari (and dismissal of an appeal) and another to note the limited grounds of his concurrence in that disposition. *Epton* v. *New York,* Nos. 502 and 771 Misc., Jan. 22, 1968, 36 U.S.L.W. 3296 (Douglas, *J.,* dissenting, and Stewart, *J.,* concurring).

With the filing of the present habeas application, petitioner applied for release on bail by this court pending decision as to whether the writ should finally issue. While the question may not be wholly free from doubt, the court concludes that there is power to grant such interim relief. See, e.g., *Johnston* v. *Marsh,* 227 F.2d 528 (3d Cir. 1955); *Application of Stocker,* 271 F. Supp. 406, 407-8 (D. N.J. 1966), *aff'd,* 381 F.2d 379 (3d Cir. 1967); *United States* v. *McCloskey,* 239 F. Supp. 419, 424 (S.D.N.Y.), *aff'd on other grounds,* 345 F.2d 305 (2d Cir. 1965), *rev'd on other grounds,* 383 U.S. 234 (1966); *United States* v. *Rundle,* 219 F. Supp. 549 (E.D. Pa. 1963), *aff'd,* 337 F.2d 269 (3d Cir. 1964). It is, however, a power that ought to be most sparingly exercised. Where the State has carried a prosecution to conviction and the verdict has been sustained through the appellate process, including denial of certiorari and dismissal of appeal by the Supreme Court, there are compelling interests on the side of proceeding to execute the criminal judgment. It should require a substantial showing of countervailing circumstances to override or postpone that objective.

Proceeding upon such premises, the court heard extensive argument and studied preliminarily the voluminous papers supporting the bail application. It appeared in

the end that this was one of the relatively rare cases in which relief of this kind should be granted. The factors leading to this conclusion are:

(1) The substantiality of the issues posed by the habeas petition.

(2) The inevitably long time it would require for the evidentiary hearing and study necessary to resolve at least the grand jury issue.

(3) The fact that petitioner, having served three months before he was released on bail pending his state appeal, will probably complete his sentence within the next five months or so.

(4) The fact, just mentioned, that petitioner actually served three months during the state appellate process, whereas the eventual ruling of the trial judge, certifying the existence of "reasonable doubt," represented a mature judgment that this period of incarceration should ideally have been avoided.

(5) The undisputed judgment, reflected in the comments of Mr. Justice Harlan granting bail pending disposition of the petition for certiorari, that petitioner presents no substantial danger of absconding while he is free on bail.

The conclusion that this was a proper case for the granting of bail, conveyed to counsel during a second oral hearing, tended in practical effect to intestify some difficult and delicate procedural problems in the case. Initially at least, there was doubt and some ambiguity as to respondent's stance with respect to the grand jury questions. It was arguable (but, in this court's tentative judgment, not ten-

ably) that petitioner had "waived" his attacks upon the indictment which raised such questions. Whether or not there had been a waiver, it was clear that these matters had never been fully explored in the state proceedings. And this in turn stirred inquiries as to whether there was an adequate and appropriate remedy yet to be exhausted in the state courts.

It became evident, for reasons that require no elaboration at this time, that there were cogent arguments against merely sending the petitioner elsewhere in pursuit of a problematical possibility of a state remedy. It was equally evident, however, that the most insistent claims of comity would make it preferable to have the courts of New York rather than the federal district court canvass the grand jury problem in the first instance. Cf. *Chestnut* v. *People of State of New York,* 370 F.2d 1, 6-8 (2d Cir. 1966), *cert. denied,* 386 U.S. 1009 (1967). That course was plainly to be preferred if it could be pursued without undue sacrifice of petitioner's personal rights.

The considerations thus briefly outlined were explored at length in frank and helpful discussions with counsel. Confronting this court's preliminary estimates that (1) there should be bail and (2) the grand jury problem, as well as the others, required plenary consideration, the District Attorney's able representative has now joined with petitioner's counsel in the following statement of position and program of action:

(1) Petitioner's contentions regarding the grand jury —affecting the statutes on their face and as applied —are open for hearing on the merits in a state *coram nobis* proceeding.

(2) In addition to acknowledging such jurisdiction, the respondent will acknowledge and concede that petitioner's release on bail should be permitted by the state court pending completion of the state remedial process.

(3) The state court hearing will proceed upon the basis of the record already made in *People* v. *Otis Chestnut* N.Y. Crim. Ct. No. B-2430/1965, now pending on appeal to the Appellate Term, plus such supplementary evidence as the *coram nobis* court may deem material and relevant.

(4) Counsel for both sides will cooperate to effect the fair and expeditious presentation of the foregoing matters to the State Court.

(5) While such steps are being taken, this court will hold in abeyance the pending habeas petition.

The foregoing outline is meant to record where we are and to reflect such judgments of fairness and propriety as the court, grateful for the skilled and professional assistance of counsel, has been able to achieve with the relative speed that the circumstances seemed to dictate. If and when further proceedings are required here, they may be commenced on two days' notice.

Dated: New York, New York
February 15, 1968

MARVIN E. FRANKEL
U.S.D.J.

Opinion of Frankel, *D.J.* Denying Petition

[Filed October 5, 1970]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

OPINION

68 Civ. 461

UNITED STATES OF AMERICA *ex rel.* WILLIAM EPTON,

Petitioner,

—against—

ALBERT NENNA, Warden,
Manhattan House of Detention for Men,

Respondent.

Appearances:

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FRANKEL, *D.J.*

This habeas corpus proceeding comes on for decision after a long, unusual and, possibly, edifying procedural history.

The petitioner was indicted by a New York grand jury on June 7, 1965, upon charges of riot (former N. Y. Penal Law, §2090), conspiracy to commit riot (former N. Y. Penal Law, §§2990, 580), criminal anarchy (former N. Y. Penal Law, §§160, 161), and conspiracy to commit criminal anarchy (former N. Y. Penal Law, §§160, 161, 580). The first of these charges was dismissed for lack of evidence by the trial judge. Petitioner was found guilty by the jury on the rest, and sentenced to one year on each count, the sentences to be served concurrently.

Appeals through the New York courts resulted in affirmances. 19 N.Y.2d 496 (1967), aff'g 27 A.D.2d 645 (1966). Epton petitioned for a writ of certiorari and appealed, urging, *inter alia*, the unconstitutionality of New York's criminal anarchy statute.[1] On January 22, 1968, certiorari was denied and the appeal was dismissed for want of a substantial federal question. 390 U.S. 29, rehearing denied, 390 U.S. 976 (1968), petition for leave to file a petition for rehearing out of time denied, 38 U.S.L.W. 3479 (June 1, 1970). Two Justices wrote brief opinions on this disposition, one dissenting, one explaining the grounds for his concurrence, and these are factors of some interest now, as will be discussed below.

On February 5, 1968, after serving some three months of his one-year sentence, petitioner brought the present

[1] In his petition for certiorari, at 16n., Epton explained that he was proceeding by way of certiorari as well as appeal because of the wording of Mr. Justice Harlan's order continuing bail "pending the timely filing and disposition of a petition for certiorari."

application for habeas. He presented again the several constitutional claims that had been before the Supreme Court. In addition, he attacked the composition of the grand jury that had indicted him, pointing out that the facts underlying this contention had never been heard in the state courts. It was evident that at least the last of these arguments presented a problem of substance, probably requiring some considerable time for its resolution. See *Chestnut* v. *People of the State of New York,* 370 F.2d 1, 6-8 (2d Cir. 1966), cert. denied 386 U.S. 1009 (1967). It seemed evident, moreover, that full consideration of this subject could probably not be accomplished before most or all of petitioner's sentence had been served. Furthermore, it was agreed that the proper place for at least the initial consideration of this matter was the state rather than the federal court. See *id.* at 6.

Reasoning together upon these considerations, counsel and the court agreed that the matter should properly go before a state tribunal for decision upon the merits; that suitable procedures were available for such handling; and that the State ought, with the consent of the prosecutor, to release petitioner on bail pending the determination of his claims. This court concluded that it would hold the petition pending such steps in the state court. Then, with what proved to be premature enthusiasm, this court recorded the history of what was then thought to be an instance of effective and agreeable comity. *United States ex rel. Epton* v. *Nenna,* 281 F. Supp. 388 (1968).

On Friday, February 16, 1968, the petitioner appeared with counsel in the Supreme Court of New York County to institute a coram nobis proceeding and have himself released on bail. This court is informed that the State Judge on that morning announced his willingness to permit the

release on bail, instructing counsel for petitioner to proceed with the procurement of a bondsman and the accomplishment of other necessary details. On the afternoon of the same day, for reasons which have never been spread upon any record known to this court, the state tribunal revoked its determination of the morning and announced that bail would not be allowed. In these circumstances, this court ordered petitioner's release the following morning on bail of $25,000 pending completion of his state coram nobis proceedings. He has been free on this order ever since.

The parties then went forward with petitioner's state post-conviction proceeding. It was agreed that Epton's claim concerning the composition of the grand jury would be determined substantially on the basis of a record already made in *People* v. *Chestnut et al.*, where a pre-trial motion challenging New York's method of selecting grand jurors had been denied after a hearing.[2] N.Y.L.J., April 5, 1967, p. 18, c. 6. On June 4, 1970, the Court of Appeals for the State of New York affirmed, as modified, the *Chestnut* convictions, including the grand jury ruling, 26 N.Y.2d 481 (1970). Accordingly, the Supreme Court of New York County denied Epton's coram nobis petition on June 18, 1970.

Returning here, where the habeas petition had been held in abeyance, the parties filed extensive briefs and were heard orally. The application for federal relief is finally ready for decision. It must be denied.

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[2] Prior to the state hearing and trial, the *Chestnut* defendants brought a removal action in this court under 28 U.S.C. §1443(1), challenging the grand jury selection system on constitutional grounds. The Court of Appeals affirmed an order of remand. *Chestnut* v. *People of State of New York*, 370 F.2d 1 (1966), cert. denied, 386 U.S. 1009 (1967).

I.

Petitioner's main point here, as has been noted, is his attack upon the composition of the grand jury that indicted him. His arguments are not without substance. See *Chestnut* v. *People of State of New York,* 370 F.2d 1, 7 (2nd Cir. 1966).[3] They have been rejected, however, by a large and unanimous array of New York State Judges. While that, in the nature of the habeas jurisdiction, does not bind a single federal judge at *nisi prius,* it is of interest. At any rate, this court reaches the conclusion that the state judgment must be sustained.

On its face at least, the most serious claim in this regard is that the court should infer a pattern of unconstitutional discrimination from the low representation of black people and Puerto Ricans on the New York County grand jury. It is not necessary to labor the point that in our constitutional scheme invidious racial classifications are fundamentally and uniformly intolerable. Recognizing that, the court concludes nevertheless that petitioner fails in this branch of his argument. There is no showing of purposeful or intentional discrimination against any racial or ethnic group. The facts and the governing legal principles are amply reviewed in the opinion of Chief Judge Fuld for his unanimous Court of Appeals. See also *United States* v. *Bennett,* 409 F.2d 889, 892, aff'g *United States* v. *Bennetti,* 291 F. Supp. 461 (1968); *United States* v. *Flynn,* 216 F.2d 354, 378-89 (2nd Cir. 1954), cert. denied, 348 U.S. 909 (1955); *United States* v. *Greenberg,* 200 F. Supp. 382, 386-87 (S.D.N.Y. 1961); *United States* v. *Bowe,* 360 F.2d 1, 7, cert. denied, 385 U.S. 961 (1966); Cf. *United States ex*

[3] As indicated above, Epton's grand jury challenge has proceeded on the basis of a hearing record prepared in *People* v. *Chestnut et al.*

rel. Torres v. *Mancusi*, 427 F.2d 168 (2nd Cir. 1970); *United States ex rel. Fein* v. *Deegan*, 410 F.2d 13, 22 (2nd Cir. 1969). Recognizing that the statistics alone comprise evidence that might (with other evidence) help to prove purposeful discrimination on forbidden grounds, see, e.g., *Turner* v. *Fouche*, 396 U.S. 346 (1970), this court finds no ground for rejecting the reasoned views on this subject of the State Court of Appeals.

Related to the argument about racial discrimination is petitioner's claim that the New York system of grand jury selection is infirm because of its voluntary nature. It is accepted for this purpose—indeed, it is hardly doubtful—that the racial disparaties result at least in part from this factor. Petitioner's argument fails none the less. It is not shown that the system of volunteers was designed or has been administered as "an exclusionary device * * *." *Hoyt* v. *Florida*, 368 U.S. 57, 61 (1961). The State's Legislature could rationally have concluded that volunteers for the solemn responsibilities of grand jurors would be more reliable, devoted and effective than compelled members. There is no ground in reason or authority for holding that coercion is a constitutional requirement in this area any more than it is in connection with voting—though we may readily accept that some defendants, like some candidates, might fare better if higher proportions of certain groups were produced by a compulsory system than by a system of choice.[4] At least on the record here, New York's volunteer system is no more vulnerable than the selectively voluntary system upheld in *Hoyt* v. *Florida*, *supra*.

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[4] Whatever strictures we hear these days about "permissiveness," there is no question in our courts that our prima facie preference is for freedom as a principle of government.

On another front, while the governing state statute, New York Judiciary Law § 596(2), makes people aged 21 to 70 eligible for service, it is undisputed that at the time in question those administering the law excluded persons younger than 35 or over 65. Petitioner attacks the exclusions of those below 35. This court need not (and does not) applaud the wisdom of this exclusion to sustain its constitutionality.[5] It is pertinent here, as elsewhere on this subject, that the State (1) is not required to proceed by grand jury indictment at all, *Hurtado* v. *California,* 110 U.S. 516 (1884); *Beck* v. *Washington,* 369 U.S. 541, 545 (1962), and (2) may assign the decision to prosecute to highly selected and specially qualified people—e.g., law-trained prosecutors. *Lem Woon* v. *Oregon,* 229 U.S. 586 (1913); *Gaines* v. *Washington,* 277 U.S. 81, 86 (1928); *Beck* v. *Washington,* 369 U.S. 541, 545 (1962). This does not mean, of course, that the State, in making up grand juries or otherwise, may employ arbitrary, irrational or otherwise lawless discriminations. It does suggest, however, that the latitude for judgment by the State is broader than petitioner would have it.

On the specific subject of age, the State justifies the minimum age of 35 or the grounds that grand jurors ought to have had petit jury experience, and that the powers of grand juries are broad, potentially drastic and relatively unfettered, requiring people of mature years and other qualities that give promise of stability. Reason-

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[5] There is no question in this court, of course, as to the validity of the exclusion under state law. As to that, petitioner's claims have been rejected by the State's highest Court. The case comes here, then, as if a lower age limit of 35 were written into the statute. *Murdock* v. *Memphis,* 87 U.S. (20 Wall.) 590 (1875); *Amer. Ry. Express Co.* v. *Kentucky,* 273 U.S. 269 (1927); *Scripto* v. *Carson,* 362 U.S. 207, 210 (1960).

able people could differ about this judgment, just as they might about the prescription in the Constitution of minimum age requirements for high federal office—35 for the Presidency (Art. II, § 1), 30 for the Senate (Art. I, § 3), 25 for the House of Representatives (Art. I, § 2). Without pursuing strained comparisons between the White House and the grand jury room, we note that age qualifications have been included among an array of others deemed permissible as criteria for both grand and petit jury service. See *Carter* v. *Jury Commission,* 396 U.S. 320, 332-33 (1970).

Coming to what is for this court the most difficult issue of all, though it appeared to be of only passing concern for the State Court of Appeals, we note the undisputed fact that welfare recipients were excluded from New York County grand juries at the time here in question. If they do not share the almost inexorable condemnation visited upon racial classifications, invidious distinctions in terms of wealth or poverty are not in markedly greater favor. *Griffin* v. *Illinois,* 351 U.S. 12 (1956); *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663 (1966); *Turner* v. *Fouche,* 396 U.S. 346, 361-64 (1970); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969). It would be difficult today to justify as an ongoing practice the discrimination against both welfare recipients themselves and at least many defendants entailed in the kind of exclusion here assailed. Acknowledging grave doubts, however, this court concludes that the point cannot prevail in the particular circumstances of its presentation here.

First of all, the record before us does not demonstrate, but tends to dispel, any showing of discrimination against poor people as such. The New York Judiciary Law, § 598, disqualifies for jury service not only broad categories of

elected and appointed officials in high office, but any state or federal "employee * * * receiving annual compensation in excess of one thousand dollars from [government] * * * sources * * *." Whether or not this is wise or essential, rational people could surely entertain the broad underlying premise that those dependent upon government for substantial income might be unsuitably conflicted if they served as jurors.[6] And the evidence here indicates that it was this rather than an animus against poor people that led to the administrative practice now in question. As Chief Judge Fuld observed, this view held by the responsible officials "may have been erroneous," but that does not in itself pose a problem of federal constitutional law (see note 5, *supra*).

The New York Court of Appeals not only cast doubt under state law upon the exclusion of people on welfare; it also made its decision on the understanding that the practice "has since been discontinued." There has been some quarrel here about the correctness of that understanding. If it were necessary to resolve this incidental difference, this court would find no sufficient basis for rejecting what Chief Judge Fuld stated as the fact. More importantly, however, we are entitled to assume that the recorded understanding of the State's highest Court, promoted there and reaffirmed here by the State's legal officers, represents the reality upon which all may confidently rely from now on. Thus, although the defect is not retroactively cured for Epton's case in any event, but hav-

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[6] Compare the cases in which defendants, though unsuccessfully, have urged such grounds in challenges for cause. E.g., *Dennis* v. *United States*, 339 U.S. 162 (1950); *Frazier* v. *United States*, 335 U.S. 497 (1948); *Kempe* v. *United States*, 160 F.2d 406, cert. denied, 331 U.S. 843 (1947).

ing in mind, too, that he has shown no concrete prejudice to himself on this account, we find the State's position buttressed by the fact that there is no prospective good to be served by invalidating the conviction. See *Bennett* v. *United States*, 409 F.2d 388, 892-93; *United States ex rel. Fein* v. *Deegan*, 410 F.2d 13, 22 (2nd Cir. 1969); *United States ex rel. Torres* v. *Mancusi*, 427 F.2d 168, 169 (2d Cir. 1970); *United States* v. *Ballard*, 329 U.S. 187, 206 (1946) (Frankfurter, *J.*, concurring).

Finally, a similar but less important point is made of the fact that the law of New York at the time in question contained a dubious requirement, see *Samuels* v. *Mackell*, 288 F. Supp. 348, 356 (S.D.N.Y.) (Friendly, *J.*, for 3-judge court), prob. juris. noted, 393 U.S. 975 (1968), that a person have property worth $250 in order to be eligible for jury service. The record here shows that this provision was not enforced in 1964, when Epton was indicted, and it has since been deleted from New York Judiciary Law § 596. There is some evidence that it was enforced as late as 1960, and it is argued that the normal replacement rate was such that grand juries four years later would still have reflected the questionable criterion. But the point dwindles with this to a speculative and attenuated proposition that cannot be deemed a substantial reason for nullifying petitioner's indictment and subsequent conviction by a petit jury the composition of which is not assailed. See *United States* v. *Leonetti*, 291 F. Supp. 461, 476 (S.D.N.Y. 1968); *United States* v. *Dennis*, 183 F.2d 201, 217-18 (2nd Cir. 1950); *United States* v. *Van Allen*, 208 F. Supp. 331, 336 (S.D.N.Y. 1962).

We conclude, in sum, that petitioner's arguments about the character of the grand jury are—singly in some in-

stances, and certainly in cumulation—scarcely insubstantial. On balance, however, and if not with certainty, this court finds them insufficient to invalidate his state conviction.

II.

In addition to his attack on the grand jury, petitioner urges a number of other grounds for voiding his conviction. For the most part these arguments are the same as those he took to the Supreme Court in his appeal and petition for writ of certiorari. The Supreme Court, as noted above, dismissed the appeal without opinion "for want of a substantial federal question" and denied certiorari. 390 U.S. 29 (1968). There were, however, short opinions by two Justices. Concurring in the Court's disposition, Mr. Justice Stewart stated that he thought the conspiracy to riot conviction should stand, and that under the concurrent sentence doctrine there was no reason to consider the other convictions for which concurrent sentences had been ordered. *Id.* Mr. Justice Douglas, finding all three convictions vulnerable, dissented. *Id.* at 30. Two petitions for rehearing, including one filed this year (more precisely, a motion for leave to file a petition for rehearing out of time), were denied. 390 U.S. 976 (1968); 38 U.S.L.W. 3479 (June 1, 1970).

Petitioner invites us to reconsider all the issues that were before the Supreme Court in 1968. The proposal is too broad. Whatever the Supreme Court has already decided in the case is the law of the case, and binds us. See, e.g., *Ex parte Sibbald* v. *United States,* 37 U.S. (12 Pet.) 488, 492 (1838); *Banco Nacional de Cuba* v. *Farr,* 383 F.2d 166, 177-78 (2nd Cir. 1967); *Munro* v. *Post,* 102 F.2d 686, 688 (2nd Cir. 1939); 1B Moore, Federal Prac-

tice ¶ 0.404[10]. The law of the case applies to what was decided "either expressly or by necessary implication." 1B Moore, *supra; Munro* v. *Post, supra,* 102 F.2d at 688.

Applying these principles, this court finds foreclosed here the serious questions petitioner renews about the constitutionality of New York's former criminal anarchy law, N.Y. Penal Law §§ 160, 161,[7] but deems it necessary to consider other, lesser arguments that were not resolved in the highest Court "by necessary implication." As to the area foreclosed, our analysis runs like this: the attack petitioner brought to the Supreme Court upon the state anarchy statute was the proper and sufficient basis for his being before that Court by appeal rather than certiorari, 28 U.S.C. § 1257(2). The majority, without opinion, dismissed the appeal "for want of a substantial federal question." That was, for the purposes of the appealable question, a disposition "on the merits" sufficient to conclude the subject for this court.[8] The phrase "on

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[7] The problem is again before the Supreme Court, in *Samuels* v. *Mackell, supra.*

[8] There is lively disagreement among respected constitutional scholars concerning the significance of the Supreme Court's dismissal of an appeal. Some argue that since Congress has obliged the Court to hear certain appeals, 28 U.S.C. §1257, the dismissal of such appeals must be viewed as decisions on the merits. See Wechsler, Toward Neutral Principles of Constitutional Law, in Wechsler, Principles, Politics and Fundamental Law 3, 13-15, 47 (1961); Gunther, The Subtle Vices of the 'Passive Virtues,' 64 Col. L. Rev. 1, 10-13 (1964); Hart & Wechsler, The Federal Courts and the Federal System 574-76 (1953), Hart, Forward: The Time Chart of the Justices, 73 Harv. L. R. 84, 89 n. 13 (1959). Others, portraying and justifying a more politically "flexible" Court, have tried to demonstrate that appeals are often "dismissals for want of a convenient, or timely, or suitably presented question" for resolution by the country's highest Court. Bickel, The Least Dangerous Branch 126-127. See also, *id.* at 71; 132, 278 n. 25 & 26; Deutsch, Neutrality, Legitimacy, and the Supreme Court, 20 Stan. L. R. 169, 198-206, 213-249 (1968);

the merits" is in quotation marks here to flag its ambiguity, but either of its possible meanings in context leads to the same result for us at the present juncture:

(1) The Supreme Court, though we are entitled to find this improbable, may have considered the substantive issues attending the anarchy statute and decided them summarily against petitioner. That would be the most obvious bar to reconsideration here.

(2) Some or all of the other Justices in the majority may have gone on the concurrent sentence doctrine announced by Mr. Justice Stewart as the basis for his vote. The result for us of this remaining logical possibility is less obvious, but in the end not different.

Elaborating the latter proposition, this court would deem itself clearly bound by a decision of the Supreme Court that other, adequate grounds immunize the state conviction against reversal without reaching the constitutional claims concerning the anarchy law. Accordingly, as things stood on January 22, 1968, when the appeal was dismissed, this court was barred from considering those claims because the Supreme Court had either decided them ~~or~~ held they should not be reached. See *Samuels* v. *Mackell, supra,* 288 F. Supp. at 354 n. 6.

M. Shapiro, Law and Politics in the Supreme Court (1964). The latter view, if accepted, might suggest that a district court could hear on habeas issues the Supreme Court has dismissed on direct appeal, just as it hears those raised in certiorari petitions which are denied.

For the time being, at least, the debate must be among scholars. Until the Supreme Court explicitly tells us otherwise, the lower courts must assume that the obligatory jurisdiction, a matter given to Congress to control, is being exercised in accordance with what appears to be the literal statutory mandate.

Petitioner argues that after its dismissal of the appeal, the Supreme Court overruled the concurrent sentence doctrine in *Benton* v. *Maryland,* 395 U.S. 784 (1969). Assuming this to be so, it makes no difference. This court is bound by the principles stated in *Gaines* v. *Rugg,* 148 U.S. 228, 244 (1893):

> "As to the suggestion that the views adopted by this court in [a case] * * * decided * * * after the present cases were decided, would, if applied to the present cases, have caused a different result in them, we are of the opinion that, without conceding that such would have been the result, this court cannot, on well-established rules and principles, permit the Circuit Court, of its own motion, to go back of, or subvert, what was settled by the opinion and mandate in the present cases."

See also *Ex parte Sibbald* v. *United States, supra; Banco Nacional de Cuba* v. *Farr, supra,* 383 F.2d at 177-78.

Furthermore, it is far from clear that the rule relating to concurrent sentences was ended utterly by *Benton.* What the case seems ultimately to hold is that where adverse collateral consequences may follow from a questioned sentence, the fact that it runs concurrently with a valid sentence is "no jurisdictional bar" (395 U.S. at 791) to considering the disputed one. The case does not eliminate the doctrine "as a rule of convenience" (*id.* at 791):

> "It may be that in certain circumstances a federal appellate court, as a matter of discretion, might decide * * * that it is 'unnecessary' to consider all the allegations made by a particular party. The concurrent sentence rule may have some continuing validity as

> a rule of judicial convenience. That is not a subject we must canvass today, however."

Subsequent decisions reveal, authoritatively for this court, the continued vitality of the "discretion" thus preserved. *United States* v. *Febre,* No. 33241 (2nd Cir., Jan. 8, 1970); *United States ex rel. Weems* v. *Follette,* 414 F.2d 417 (2nd Cir. 1969); *Kauffmann* v. *United States,* 414 F.2d 1022 (8th Cir. 1969); *United States* v. *Barsaloux,* 419 F.2d 1299 (5th Cir. 1969), cert. denied 90 S. Ct. 1087 (1970).

If it is discretionary whether the concurrent sentence doctrine will apply despite the disposition by the Supreme Court almost three years ago, the appeal must lie to the discretion of that Court, not this one.

The case stands differently for the questions Epton raised in the Supreme Court which were not appealable as of right but permissible points for certiorari. It is familiar that the denial of certiorari is not to be viewed as an "expression of opinion on the merits" and that questions rejected by denials of certiorari on the direct appeal route are open later in habeas. *Brown* v. *Allen,* 344 U.S. 443, 497 (1953) (Frankfurter, *J.*); see also 1B Moore, *supra* at ¶ 0.404[5]; 1A Moore, *supra* at ¶ 0.230 [2]. The details of this proposition could be further proliferated, but they are not momentous. This court is satisfied that on at least the first of the two subjects hereinafter discussed, petitioner is entitled to a ruling in this proceeding. Still others will not be discussed here though they have been considered.

A. For his first point after the ones concerning the anarchy statute, petitioner argues that his right to due process was violated when at the close of the evidence

the trial judge amended the conspiracy-to-riot count so that instead of charging a conspiracy to promote

> "an assembly of more than three persons *which disturbed* the public peace,"

it charged a conspiracy to promote

> "an assembly of more than three persons which *would disturb* the public peace * * *." (Emphasis added in both versions.)

Petitioner shows no prejudice from this revision. Cf. *Russell* v. *United States,* 369 U.S. 749, 763 (1961). His claim that it violated the Fourteenth Amendment is not meritorious.

Obviously if the change altered in some meaningful way the one against which petitioner had been summoned to defend, his point would be significant. But it is equally obvious that no such unfairness occurred. The accusation in the count in question was one of *conspiracy* to riot; the substantive offense of rioting was separately charged in a separate count. Thus, petitioner had ample notice that he was accused of the substantive crime and, in addition, of the conspiracy to commit it, which would, of course, be complete whether or not the substantive goal was ever attained. *Pinkerton* v. *United States,* 328 U.S. 640 (1946); *United States* v. *Rabinowich,* 238 U.S. 78 (1915); *People* v. *Tavormina,* 257 N.Y. 84 (1931). All the judge's verbal change did was to make somewhat clearer this elementary distinction.

B. Petitioner's next argument—and the only other one requiring moderately detailed treatment here—is somewhat more troublesome. He urges that his conviction for

conspiracy to riot must be voided because activities protected by the First Amendment were the only overt acts charged and proved under this count.

To begin with, petitioner misstates the facts. As was noted when the case was in the Supreme Court, the evidence in question included evidence of conduct outside the sphere of the First Amendment. See 390 U.S. at 29-30 fn. (Stewart, *J.*, concurring); *id.* at 33 n. 2 (Douglas, *J.*, dissenting). Not only was there such "unprotected" evidence; it was evidently central to the prosecution's case in terms of emphasis and potential impact on the jury. It included, for example, evidence of Epton's guidance to an assemblage on "suckering" policemen onto side streets to kill them; his instructions on manufacture and use of weapons for street warfare; his planning of demonstrations and other events, not to convey ideas, but as occasions and techniques for the fomenting of physical violence. These were the kinds of things—evidence of efforts to promote "guerilla warfare," "terrorism," "killing"—that were relied upon in page after page of the prosecution's summation, the whole thrust of which was to dispel the claim that Epton had been engaged in peaceful persuasion and to show instead that "the important evidence" (Tr. 1803) demonstrated Epton's purpose directly and immediately to get people in Harlem to "start rioting, continue to riot, and * * * keep the situation fired up." (Tr. 1813). These are the realistically major and critical materials on which the New York Court of Appeals, unanimous in this respect, found the evidence, including words, to establish a "'clear and present danger' of riot." 19 N.Y.2d at 507.[9] And it seems evident from the character

[9] In his brief to the New York Court of Appeals (p. 69), petitioner insisted that the question of "clear and present danger" is one "for the court alone," and that the trial judge had erred in giving it to the jury.

of the evidence and the arguments about it that the jury would not have convicted unless it had rejected petitioner's testimony that his violent language was figurative and had accepted the prosecutor's thesis that the talk of terror, killing and warfare was "advocacy of the use of force or of law violation * * * directed to inciting or producing imminent lawless action and * * * likely to incite or produce such action." *Brandenburg* v. *Ohio,* 395 U.S. 444, 447 (1968).

In this setting, building upon the dissent of Mr. Justice Douglas, 390 U.S. at 34 n. 2, petitioner argues that the conviction must be nullified because the trial judge did not caution the jury against convicting solely on "constitutionally protected" overt acts. This court notes, however, that:

(1) there is no claim that any such limiting instruction was ever requested;

(2) petitioner never claimed error in the failure to give such an instruction in his brief to the New York Court of Appeals, his petition for certiorari or his jurisdictional statement;

(3) the absence of a request or argument on direct appeal is perfectly understandable since it seems plain that the jury, as a matter of fact, would not have convicted unless it had focussed precisely on the steadily emphasized evidence of unprotected overt acts.

It is not possible, of course, to be mathematically certain that the jury did not convict solely upon one of the "protected" overt acts. But this is true in most con-

spiracy cases, where the list of overt acts commonly includes many things, innocent in themselves, comprised of speech—meetings, conversations, communications. It has not followed that limiting instructions of the type petitioner now claims as essential must be given routinely.

Beyond that, this court finds solid conviction in the record here that the point so tardily urged is an empty abstraction. The possibility against which an instruction is now demanded was not a real one in terms of the evidence, the argument and the instructions before the jury.

C. A number of other issues are tendered with respect to various rulings of the state trial court and conduct of the prosecutor. They have been studied. The court concludes that they do not, individually or collectively, constitute a basis for federal habeas corpus.

III.

Petitioner has been on bail for almost three years while the State Courts considered the grand jury problem left for them on grounds of comity. There has never been any question that the problem was one of substance. Nevertheless, but for our bail order, Epton would have served his sentence long before the State had completed its proceedings. Cf. *Green* v. *City of Orlando,* 313 F. Supp. 583, 584 (M.D. Fla. 1970). Despite this court's conclusions today, there remains an authoritative pronouncement that his claims have substance. See *Chestnut* v. *People of State of New York, supra,* 370 F.2d at 6-7. The reasons underlying this court's order releasing petitioner on bail seem effective still for the period necessary for him to prosecute an expeditious appeal. Accordingly, that order remains effective, and this court, to minimize delay, now

issues its certificate of probable cause under F.R.A.P. 22(b).[10]

To conclude, then, for the reasons reviewed above, the petition is denied.

It is so ordered.

MARVIN E. FRANKEL
U.S.D.J.

Dated: New York, New York
October 5, 1970

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[10] The continuance of bail herein would not be ordered, of course, if it were thought inconsistent with Judge Anderson's order of July 31, 1970, sustained by a three-judge bench on September 18, 1970 (*United States ex rel. Chestnut* v. *Criminal Court,* No. 35209, 2d Cir.), staying the district court's order granting bail to Chestnut and his co-petitioners.

There, the conviction being for contempt of the grand jury, not for a crime charged by the grand jury, Judge Anderson stressed that "petitioners [were] not accused, indicted by an unconstitutionally selected grand jury but [were] witnesses called to testify before a grand jury instituted, by the regular procedures of the State of New York, who were granted immunity and later held in contempt by the court for nonetheless refusing to testify. That there may have been some invalidity, even of constitutional dimensions in convening the jury is, in a case of this kind, completely irrelevant. Their affront was to the judicial system of the State and must be dealt with as is perjury in a prosecution based upon an unconstitutional criminal statute. See *United States* v. *Manfredonia,* 414 F.2d 765, 765, note 5 (2d Cir. 1969)." Memo. of Judge Anderson, Aug. 3, 1970, quoted in the *Chestnut* brief in this court.

APPENDIX A-3

Opinion of the Court of Appeals of May 16, 1967

SCILEPPI, *J.*:

The defendant, William Epton, has been found guilty on three counts of a four count indictment. After a trial with a jury in the Supreme Court, New York County, he was convicted of conspiracy to riot (Penal Law, §§580, 2090), conspiracy to commit the crime of advocacy of criminal anarchy (Penal Law, §§160, 161, 580), and advocacy of criminal anarchy (Penal Law, §§160, 161). A fourth count, charging defendant with the substantive crime of riot, was dismissed by the trial court for lack of evidence as to any direct, causal connection between Epton's activities and the Harlem riots of the summer of 1964. Defendant was sentenced to one year concurrent sentences on the three counts on which he was found guilty.

The defendant, a self-acknowledged Marxist and president of the Harlem "club" of the Progressive Labor Movement, a splinter communist club dedicated to violent revolution, was shown by the evidence on his trial to have been active in the Harlem community for many months prior to the 1964 riots. His activities before the riots, however, appear largely to have been limited to formation of a small cadre of followers, who, presumably, would play leadership roles in the eventual revolution toward which their movement was directed. There is no evidence in the record that Epton or his party at any time had a substantial following in the community, and one gets the distinct impression on reading the record that, had it not

been for the apparently spontaneous build-up of pressures within the Negro ghettos of New York City in the summer of 1964, following the killing of a fifteen year old Negro boy by an off-duty police lieutenant, Epton and his group might well have continued little noticed and of scant significance to anyone but themselves. There is, likewise, no evidence here that the defendant or his alleged co-conspirators had any hand in causing the riots that began on the evening of July 18, 1964, and it would appear that it was not until May, 1964, when tensions in Harlem had already heightened over the issue of police brutality, that Epton and the others seized upon the notion that this unrest in the community might be utilized by them in developing a mass following.

On the afternoon of the 18th, just before the riots began, Epton took to the streets of Harlem preaching his gospel of revolution and calling for organized resistance to the police. Addressing an audience numbering about 50 persons the defendant spoke of the need for violent action:

> "[W]e'll begin a campaign to organize a mass demonstration against the cops somewhere in this city. As it stands now, many organizations are talking and planning of where this demonstration is going to take place and we're not saying it's going to be a peaceful demonstration * * *. They [the cops] declared war on us and we should declare war on them and every time they kill one of us damn it, we'll kill one of them and we should start thinking that way right now * * * because we had better stop talking about violence as a dirty word * * *.
>
> "* * * If we're going to be free, and we will not be fully free until we smash this state completely and

totally. Destroy and set up a new state of our own choosing and of our own liking. And in that process of making this state, we're going to have to kill a lot of these cops, a lot of these judges, and we'll have to go up against their army. We'll organize our own militia and our own army * * *. Think about it because no people in this world have ever achieved independence and freedom through the ballot or having it legislated to them. All people in this world who are free got their freedom through struggle and through revolution. That's the way to gain freedom."

" * * * We will take our freedom. We will take it by any means necessary and any means necessary as we know the beast that we are dealing with is that we have to create a revolution in this country and we will create a new government that is run by the people * * *. Those who are ready to come with us and stand with us and join the Harlem Defense Council * * * will go back into their blocks and organize their blocks into defense committees so when the deal goes through they will be able to be in the street tens of thousands strong ready to face that man. And we know how to use weapons just like they know how to use weapons. And when the deal goes down we have to be ready to confront them and beat them * * *".

In the days that followed, the Harlem headquarters of the Progressive Labor Movement became a beehive of activity with the defendant exhorting those in attendance to organize their blocks to combat the police and with the defendant and his helpers feverishly getting out leaflets attacking the police. Much of this effort was directed to-

ward generating enthusiasm for a mass demonstration planned for July 25th. If the people's evidence is to be believed, and the jury was entitled to believe it, the only conclusion that can reasonably be drawn is that in the week following the commencement of the riots on the 18th, Epton and the others named as his co-conspirators were engaged in doing their utmost toward keeping the disturbance going and their purpose in planning the demonstration for the 25th was to trigger further violence and rioting.

Specific examples of the sort of evidence which justifies, if not compels, the conclusion that defendant and his alleged co-conspirators had agreed to try to incite the people of Harlem to further and continued rioting are the following:

1) Testimony by Detective Hart, the undercover police officer planted in defendant's group, to the effect that on July 19th, within sight and hearing of the ongoing riots, the defendant addressed a group of about thirty-five to forty persons at the Harlem headquarters of the Progressive Labor Movement, stating that the people of the area would have to organize to combat the police and that there were various means of defeating the police, including "suckering" the officers off the main avenues into the side streets away from other policemen where they could be killed one by one.

2) Testimony by another police officer, Patrolman Johnson, who was present in plain clothes at the Progressive Labor Movement headquarters on the night of the 19th, that he heard the defendant on that occasion, in answer to a question by a woman in the audience inquiring how they could fight the "cops", suggest that their "block cap-

tains" could teach them how to make weapons out of things in the street, informing his audience that when bottles are filled with a "certain substance" (presumably gasoline) they become "very effective" (as Molotov Cocktails).

3) Testimony by Hart that on the 21st the defendant told him that it was his wish to "start something" over in Brooklyn in order to spread thin the police forces concentrated in Harlem, and he was sending speakers to a rally there planned for the following day.

4) Wired with a "minifon", Hart on the 21st recorded a conversation involving the defendant, Hart, and certain others, wherein with respect to his planned demonstration set for the 25th, Epton said "Oh, it's going to lead to nothing but a slaughter, a massacre * * * a massacre."

5) On the 23rd the defendant allegedly told Hart of his arrangements for the march set for the 25th and how he hoped the crowd would react violently to his expected arrest.

Coupled with this evidence is the defendant's admitted responsibility for the production of thousands of inflammatory posters and pamphlets (although the trial court did hold that the one pamphlet for which defendant denied responsibility, containing instructions on the manufacture of molotov cocktails, had not been shown to be connected with the defendant's group, and thus, should be stricken as evidence). These publications seem clearly to have been designed to further arouse the already troubled people of Harlem. All in all, the people's evidence, most of which is not seriously disputed by the defendant, paints a picture of an organized campaign aimed at fostering continuance of the riots.

On this appeal, the defendant alleges many grounds upon which his convictions should be reversed, the principal ones being: [1] that his convictions on the counts in the indictment charging him with violation of §§160 and 161 of the Penal Law and with conspiracy to violate the aforesaid sections cannot stand on the ground that §§160 and 161 as construed by this court in *People* v. *Gitlow* (234 N.Y. 132) are an unconstitutional restraint on free speech; [2] that the Smith Act of 1940 (18 U.S.C. §2385) supersedes the enforceability of our criminal anarchy statute; [3] that his conviction for conspiracy to riot cannot stand because so much of the evidence against him on this count consisted of speech, therefore, a conviction on that count would amount to punishment directed solely at speech; [4] that he was illegally convicted of the crime of conspiracy to riot since conspiracy to riot was merged into the substantive charge of riot which was dismissed by the court. Finding defendant's contentions to be without merit, we affirm.

When we last considered the constitutionality of §§160, 161 of the Penal Law, we held, and the Supreme Court of the United States affirmed over the vigorous objection of Mr. Justices Holmes and Brandeis, that they were constitutional (*People* v. *Gitlow, supra;* aff'd sub nom. *Gitlow* v. *New York,* 268 U.S. 652). We are, of course, aware that the Supreme Court's view of the First Amendment's protection of speech has been altered drastically since *Gitlow* was decided. Although *Gitlow* has never been expressly overruled, it is now generally conceded that the Holmes-Brandeis view in *Gitlow* which insisted upon a showing of "clear and present danger" before one's freedom of speech may be abridged represents today's law (*Dennis* v. *United States,* 341 U.S. 494; *Yates* v. *United States,* 354 U.S. 298).

We are thus presented with a statute which is unconstitutional as interpreted. The dissent contends that our decision in *Gitlow* reflects the legislature's intent to make unlawful the mere advocacy of violent revolution, and that we are bound by our prior decision under the doctrine of *stare decisis*. We cannot agree.

It must be assumed that the legislature intended to enact a statute which was in harmony with the United States Constitution and the Constitution of the State of New York (*People* v. *Finkelstein*, 9 N Y 2d 342). When we first interpreted this statute in 1922, we did so in light of the prevailing conditions of that time and in accordance with the current understanding of first amendment freedoms. As we have noted, re-examination of our first amendment rights both by our Court and the Supreme Court of the United States, has resulted in a clearer understanding of the scope of constitutional protection of speech. We have not had an opportunity, however, until now, to re-examine our determination in *Gitlow* in light of the recent developments in constitutional theory. Now that our criminal anarchy statute is again before us, we have the obligation of construing it in accordance with sound constitutional principles so as to preserve its constitutionality (*People* v. *Finkelstein, supra* at 345; *Dollar Co.* v. *Canadian C & F Co.*, 220 N.Y. 270). In *Dollar*, this Court was presented with a statute which we had previously found to be constitutional. Subsequent holdings by the Supreme Court, however, made it clear that our previous interpretation of the statute in question was no longer in harmony with the Federal Constitution. The argument was made in *Dollar* that the court was bound under the doctrine of *stare decisis* to its previous interpretation and it could not reconstrue the statute in order

to sustain it. The court speaking through Chief Judge Hiscock stated:

> "The language of . . . [the statute] remains precisely as it was then and the rule governing our interpretation of it remains unchanged, and it seems to us that we are now bound to give to its language an interpretation which is in accordance with and not in defiance of the Constitution, even though such interpretation is different than the one which was given under a former and, as it must now be assumed, mistaken idea of the law. The obligation to construe the statute in accordance with the Constitution remain constant, and if the definition of the requirements of the Constitution in respect of this question has been changed, it seems inevitably to follow that we must place upon the statute a construction which will be so modified as to be in accordance with the latter view" (*Dollar Co.* v. *Canadian C & F Co., supra* at 277-8).

What are these sound constitutional requirements which must now be read into our criminal anarchy statute to preserve its constitutionality? It is clear that the proscription of mere advocacy of the violent overthrow of the government would be an unconstitutional infringement upon free speech (*Dennis* v. *United States, supra*). The advocacy of the overthrow of the government by force and violence must be accompanied by an intent to accomplish the overthrow (*Dennis* v. *United States, supra; Keyishian* v. *Board of Regents,* 385 U.S. 589) and there must be a "clear and present danger" that the advocated overthrow may be attempted or accomplished (*Dennis* v. *United States, supra*).

There is no doubt that Epton intended to inflame the already intense passions of the troubled people of Harlem and to incite them to greater violence. Furthermore, defendant's exhortations calling for organized resistance to the police and the destruction of the state, in the setting of Harlem during the week of July 18th, formed a sufficient basis for the trial court and jury to conclude that his words and actions created a "clear and present danger" that the riots then rocking Harlem would be intensified or, if they subsided, rekindled.

The dissent contends that our reinterpretation of the criminal anarchy statute in accordance with modern day constitutional standards violates the defendant's right to procedural due process since he was not given fair notice of what acts would be punished. Aside from the fact that the defendant can be charged "with knowledge of the scope of subsequent interpretation" by this Court (*Winters* v. *New York,* 333 U.S. 507, 514; *People* v. *Finkelstein,* 9 N Y 2d 342, 345-6), he had the benefit of the Supreme Court's interpretation in *Dennis* of the Smith Act (18 U.S.C. §2385), the language of which is practically identical to the language of our criminal anarchy statute.

While the defendant may find support in *Pennsylvania* v. *Nelson* (350 U.S. 497) for his contention that federal legislation has preempted the field of control of subversive activities, subsequent pronouncements by the Supreme Court have restricted the scope of the *Nelson* opinion and have left the defendant's contention without merit. In *Uphaus* v. *Wyman* (360 U.S. 72) and *DeGregory* v. *New Hampshire Atty. Gen.* (393 U.S. 925), the Court made it clear that a state could validly prosecute seditious activity directed against a state or local government even though Congress has preempted the field

of sedition which is directed against the Federal Government (see also, *Matter of Prensky* v. *Geller,* 22 A D 2d 559, lv. to app. den., 16 N Y 2d 486, app. dismd. 384 U.S. 101; *Matter of Goldstein* v. *Gellinoff,* 19 N Y 2d 792).

Defendant's contention that his conviction for conspiracy to riot cannot stand because so much of the evidence against him consisted of speech, misrepresents the gravamen of the conspiracy to riot charge. The gravamen of the charge is that the defendant entered into an unlawful agreement with others to incite and instigate riot and committed certain overt acts in furtherance of this end. Though speech may have been a means by which the defendant sought to further this end of the conspiracy, speech in and of itself is not the object of a prosecution for conspiracy to incite riot. There are, of course, First Amendment limitations upon prosecutions for non-speech crimes, where the evidence of such crimes consists solely of speech. As Chief Justice Vinson observed in *Dennis,* "Where an offense is specified by a statute in non-speech or non-press terms, a conviction relying upon speech or press as evidence of violation may be sustained only when the speech or publication created a 'clear and present danger' of attempting or accomplishing the prohibited crime" (*Dennis* v. *United States, supra* at 505). As was stated above, the evidence adduced by the people was more than sufficient to sustain a finding of a "clear and present danger" of riot.

Defendant's argument that the crime of conspiracy to incite riot necessarily merges in the crime of riot is equally ill-founded. It is well settled that conspiracy is an independent crime for which a defendant can be indicted in addition to being indicted for the substantive crime he allegedly conspired to commit (*People* v. *Tavormina,* 257

N.Y. 84). A conspiracy to riot is quite separable from the riot itself. The essence of a conspiracy is an agreement or plan among two or more persons to commit a crime in the future. The crime of riot, however, is not committed until three or more persons, actually assembled, have disturbed or immediately threatened the public peace. A previous agreement or plan is not a necessary element of the crime (Penal Law §§2090, 2091). One who agrees with others to organize a riot sometime in the future and who commits an overt act pursuant to that agreement is guilty not of riot but of conspiracy to riot. Therefore, the conspiracy to riot charge and the conviction thereof was proper.

We have examined the other contentions raised by the defendant and have found them to be equally lacking in merit. Accordingly, the judgment of the Appellate Division affirming the defendant's conviction for the crimes of conspiracy to riot, conspiracy to commit the crime of advocacy of criminal anarchy and advocacy of criminal anarchy should be affirmed.

BURKE, *J.* (dissenting in part):

While I am in agreement with the majority of the Court that this defendant's conviction on the count in the indictment charging him with conspiring with certain named others to incite riot should be affirmed, I am constrained to dissent from so much of today's holding as affirms his conviction on the counts based on New York's criminal anarchy statute (Penal Law, §§ 160 and 161).

"It is settled law that a statute so vague and indefinite, in form *and as interpreted,* as to permit within the scope of its language the punishment of incidents fairly within the

protection of the guarantee of free speech is void, on its face, as contary to the Fourteenth Amendment." (*Winters* v. *New York,* 333 U.S. 507, 509; emphasis added.) New York's criminal anarchy statute is such a statute. It was authoritatively construed by this Court in 1922 to permit a criminal conviction for speech without any showing that a "clear and present danger" of harm existed. (*People* v. *Gitlow,* 234 N.Y. 132.) The Court there was satisfied that mere advocacy of such doctrine was sufficient to support the imposition of criminal liability. (See *People* v. *Gitlow, supra,* at 138 and 150-51.) This view of the state's power to limit speech is not, of course, good law today, and the dissent of Justices Holmes and Brandeis in the Supreme Court in the *Gitlow* case (268 U.S. 652, 672-73), calling for a showing of clear and present danger before speech may be outlawed, is now recognized as representing the proper view. (See, *e.g., Yates* v. *United States,* 354 U.S. 298, 318; *Dennis* v. *United States,* 341 U.S. 494, 507 and 541.) The *Gitlow* decision did, however, I submit, reflect that intention which the legislature had in enacting sections 160 and 161 of the Penal Law, and I am of the opinion that the attempt by the Court today to so limit the statute as to preserve it from unconstitutionality cannot, at least with respect to this defendant, cure the defect of overbroadness which inheres in this statute as written and as authoritatively construed in *People* v. *Gitlow.*

The usual rule is that once a statute has been interpreted by the courts this interpretation becomes as much a part of the enactment as if incorporated into the language of the act itself and is binding upon subsequent courts in accordance with the rules of *stare decisis* and the doctrine of precedent. (See McKinney's Consol. Laws of N.Y., Stat-

utes, Book 1, § 72, and the cases cited therein.) Today, however, this principle is rejected on the ground that statutes are to be construed so as to preserve them from unconstitutionality, if possible (see *People* v. *Finkelstein,* 9 N.Y. 2d 342), a sound enough guide to construction, but only a guide, and out of place where construction is not called for, where we know from the language of a statute and from its history what it was the legislature intended to achieve in enacting it. When, as here, we have once ascertained what the legislature sought to do in enacting a statute (and in the case of our criminal anarchy statute we can have no real doubt that our legislature did in fact intend to make unlawful the mere advocacy of such doctrine, with no requirement that this advocacy constitute a clear and present danger), the nature of our function demands that we adhere to our earlier interpretation of the statute. We are not an extension of the legislature, authorized to rewrite statutes through constant "reinterpretation" designed to effectuate what we divine the legislature *would* or *should* now desire the law to be. The Court's present invocation of a canon of construction calling for a statute to be construed so as to preserve its constitutionality, designed only to aid in resolving ambiguities, constitutes in this setting, in which no member of the Court has any doubts about the intent of the legislature, the usurpation of "a power which our democracy has lodged in its elected legislature." (Frankfurter, Some Reflections on the Reading of Statutes, 1947 Cardozo Lectures before the Association of the Bar of the City of New York, p. 13, 47 Col. L. Rev. 527, 533 [1947]. See also McKinney's Statutes, § 73 on Judicial Legislation and the cases cited therein.)

The majority cite *Dollar Co.* v. *Canadian C. & F. Co.* (220 N.Y. 270) as authority for their undertaking to reinterpret §§ 160 and 161 so as to preserve them from unconstitutionality. They fail, however, to mention anything at all about the nature of the statute there involved or about the nature of the alleged constitutional defects in this Court's prior decision involving that statute. There, in fact, all that was involved was a statute describing how service of process might be made on a foreign corporation, namely by service on certain officers within this State. The statute was on its face constitutional. The only problem was that in earlier cases such service had been held sufficient to give our courts jurisdiction over foreign corporations whose officers happened to have been served here but which did not *do business* in this State, with this Court *assuming* that jurisdiction could be acquired over such corporations by the mere device of serving their officers here. (See, *e.g.*, *Pope* v. *Terre Haute Car & Mfg. Co.*, 87 N.Y. 137.) This view of the permissible limits of our exercise of jurisdiction was later seen to be unconstitutional and in *Dollar* the question was raised whether the statute must fall in its entirety even where there was a constitutional basis for jurisdiction. The Court was apparently quite troubled by the difficulties it envisioned in upholding the statute, but under present day analysis it seems clear that this difficulty was more apparent than real, for the most that could possibly be said for the Court's earlier treatment of the statute was that it amounted to an unconstitutional application of a statute clearly constitutional on its face. In fact, it can even be argued that in the earlier cases this statute was not viewed as the basis for the exercise of jurisdiction, but only as descriptive of the manner in which service of process

was to be made, assuming the courts of this State had a basis for such jurisdiction. The Court's remarking in *Dollar* that it "did not read into the statute any new words or affix any new, peculiar or unalterable meaning to the words which were there" (220 N.Y. at 277) is, in effect, recognition that there was in fact no problem of redefining legislative intent there. This, of course, is far different from what is undertaken today.

Over and above the impropriety of such judicial legislation, however, is the more serious problem of the Court's allowing an apparently moribund statute, whose previous authoritative construction would today clearly be held unconstitutional, to be invoked as a means of punishing speech. This seems clearly unconstitutional, as parties should be entitled in this favored area of conduct to rely upon a relatively stable and certain body of law. As the Supreme Court has noted, "A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions, protected by the principles of the First Amendment, violates an accused's rights under *procedural due process* and freedom of speech or press." (*Winters* v. *New York, supra,* at 509-10; emphasis supplied.) While the decisions of the United States Supreme Court indicate that once an acceptable limiting construction has been obtained for a criminal statute affecting speech it may be applied to conduct occurring prior to that construction (see cases cited in *Dombrowski* v. *Pfister,* 380 U.S. 479, 491, n. 7), there must be afforded fair warning to defendants before such application. In *Dombrowski* v. *Pfister* (*supra*) the Supreme Court in this connection and with apparent approval cited *Lanzetta* v. *New Jersey* (306 U.S. 451; cited

in *Dombrowski* v. *Pfister, supra,* at 491, n. 7). In *Lanzetta* the court made clear that a penal statute, in order not to offend due process, must prescribe rules of conduct and warn against transgression. It observed that where "men of common intelligence must necessarily guess at its meaning and differ as to its application" a penal statute cannot stand (306 U.S. 451, 453). Such a statute is our criminal anarchy statute as it is presently being invoked.

Sections 160 and 161 of our Penal Law declare that the advocacy of criminal anarchy is a felony. Section 161 declares that it is punishable by imprisonment for not more than ten years, or a fine of not more than five thousand dollars, or both. Such a harsh penal statute directed against speech may not, I submit, remain in as long suspense as to its applicability as our criminal anarchy statute did following our *Gitlow* decision. Procedural due process is offended by its invocation where no one, prior to today, would have been able to predict with any degree of confidence what treatment the statute would receive from the courts. In fact, its authoritative construction by this court indicated that it was unconstitutionally broad. Though it remained on our statute books, as construed originally, it was a dead letter. Its attempted revival is in my view unconstitutional.

I would modify the judgment below to the extent of reversing defendant's conviction on the two counts in the indictment based on §§ 160 and 161 of our Penal Law.

Judgment affirmed. Opinion by Scileppi, *J.* All concur except Burke, *J.*, who dissents, in part, and votes to modify as to two counts in the indictment in an opinion and Breitel, *J.*, taking no part.

APPENDIX B

Statutes Involved

New York Penal Law (McKinney's Consolidated Laws of New York)

§160. *Criminal anarchy defined*

Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.

§161. *Advocacy of criminal anarchy*

Any person who:

1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,

2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or,

3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or of any civilized nation having an organized government because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or,

4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine.

Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both.

§580. *Definition and punishment of conspiracy*

If two or more persons conspire:

1. To commit a crime; or,

2. Falsely and maliciously to indict another for a crime, or to procure another to be complained of or arrested for a crime; or,

3. Falsely to institute or maintain an action or special proceeding; or,

4. To cheat and defraud another out of property, by any means which are in themselves criminal, or which, if executed, would amount to a cheat, or to obtain money or any other property by false pretenses; or,

5. To prevent another from exercising a lawful trade or calling, or doing any other lawful act, by force,

threats, intimidation, or by interfering or threatening to interfere with tools, implements, or property belonging to or used by another, or with the use or employment thereof; or,

6. To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws,

Each of them is guilty of a misdemeanor.

§2090. *Riot defined*

Whenever three or more persons, having assembled for any purpose, disturb the public peace, by using force or violence to any other person, or to property, or threaten or attempt to commit such disturbance, or to do an unlawful act by the use of force or violence, accompanied with the power of immediate execution of such threat or attempt, they are guilty of riot.

New York Judiciary Law (McKinney's Consolidated Laws of New York)

§596. *Qualifications of jurors*

In order to be qualified to serve as a juror in the counties included within a city having a population of one million or more, a persons must: 1. Be a citizen of the United States, and a resident of the county.

2. Be not less than twenty-one, nor more than seventy years of age.

3. Be the owner, in his or her own right, of real or personal property of the value of two hundred and fifty dol-

lars; or the husband of a woman or wife of a man who is the owner, in his or her own right, of real or personal property of that value.

4. Be in the possession of his natural faculties and not infirm or decrepit.

5. Not have been convicted of a felony or a misdemeanor involving moral turpitude.

6. Be intelligent; of sound mind and good character; well informed; able to read and write the English language understandingly.

A person dwelling or lodging or having or maintaining a dwelling or lodging in a county for the greater part of the time between October first and June thirtieth next thereafter, is a resident of that county, within the meaning of this section.

APPENDIX C

Indictment

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

—against—

WILLIAM EPTON,

Defendant.

THE GRAND JURY OF THE COUNTY OF NEW YORK, by this indictment, accuse the defendant of the crime of CONSPIRACY in violation of Section 580 of the Penal Law, committed as follows:

The defendant, Vivian Anderson, William McAdoo, David Douglas, Otis Chestnut, Harold Young, Michael Crenovich and others, in the County of New York, from on or about July 16, 1964, continuously up to on or about July 25, 1964, did knowingly, wilfully, wrongfully, unlawfully and corruptly conspire with each other to commit a crime in violation of Section 2090 of the Penal Law in that the conspirators did agree to participate in a riot by instigating, promoting, aiding, abetting, counseling, commanding, inducing and procuring an assembly of more than three persons which disturbed the public peace by using force and violence to police officers of the City of New York.

Overt Acts

In furtherance of said conspiracy and to effect the objects thereof, the conspirators in the County of New York committed and caused to be committed the following overt acts:

1. On or about July 16, 1964 the defendant conferred with others.
2. On or about July 17, 1964 the conspirators prepared and distributed a leaflet entitled "Stop the Cops!"
3. On or about July 18, 1964 the defendant made a speech wherein he discussed the killing of cops and judges.
4. On or about July 19, 1964 the defendant discussed the preparation of a "Wanted for Murder" leaflet.
5. On or about July 19, 1964 a second leaflet entitled "Stop the Cops" was prepared and distributed.
6. On or about July 19, 1964 the defendant made a speech wherein he discussed the killing of police officials.
7. On or about July 19, 1964 the defendant discussed the use of Molotov cocktails.
8. On or about July 19, 1964 the defendant discussed on a number of occasions the production of a "Molotov Cocktail" leaflet.
9. On or about July 20, 1964 the defendant distributed copies of a "Wanted for Murder" leaflet.
10. On or about July 20, 1964 the defendant prepared and distributed a leaflet entitled "Organize Your Blocks."

11. On or about July 20, 1964 the defendant discussed starting disturbances in Brooklyn, New York.

12. On or about July 21, 1964 the defendant caused to be printed additional copies of a "Wanted for Murder" leaflet.

13. On or about July 21, 1964 the defendant possessed copies of a leaflet entitled "Stop the Killer Cops Now."

14. On or about July 24, 1964 the defendant prepared a leaflet entitled "Murphy Has Violated Our Constitutional Rights."

15. On or about July 25, 1964 the defendant conferred with others.

Second Count:

AND THE GRAND JURY AFORESAID, by this indictment further accuse the defendant of the RIOT, in violation of Section 2090 of the Penal Law, committed as follows:

The defendant from on or about July 16, 1964, continuously up to on or about July 25, 1964, did participate in a riot by being personally present among and by instigating, promoting, aiding, abetting, counseling, inducing and procuring an assembly of more than three persons which disturbed the peace by using force and violence to police officers of the City of New York.

That the said defendant did participate in and instigate, promote, aid, abet, counsel, command, induce and procure others to unlawfully assemble for the purpose of resisting the enforcement of certain statutes of the state and of obstructing public officers of this state in the performance of their duties.

Third Count:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the defendant of the crime of CONSPIRACY, in violation of Section 580 of the Penal Law, committed as follows:

The defendant, Vivian Anderson, William McAdoo, David Douglas, Otis Chestnut, Harold Young, Michael Crenovich and others in the County of New York from on or about November 1, 1963, to on or about July 25, 1964, did knowingly, wilfully, wrongfully, unlawfully and corruptly conspire with each other to commit a crime in violation of Section 161 of the Penal Law, in that the conspirators did agree to advocate, advise and teach, by word of mouth and writing, the duty, necessity and propriety of overthrowing and overturning the organized government of the State of New York by assassination of the executive officials of the government and by force and violence.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the conspirators in the County of New York committed and caused to be committed the following overt acts:

1. On or about November 22, 1963 the defendant discussed certain tactics to be used against the police.
2. On or about January 2, 1964 the defendant conferred with another regarding secrecy of communications.
3. On or about January 23, 1964 the defendant prepared and distributed printed material entitled the "Right to Revolution."

4. On or about March 9, 1964 the defendant discussed the use of firearms.

5. On or about March 9, 1964 the defendant stated he would provide ammunition and firearms.

6. On or about March 28, 1964 the defendant met with others at 8503 Broadway in New York City.

7. On or about April 21, 1964 a plan for organizing and arming others was discussed.

8. On or about May 5, 1964 the use of rifles was discussed.

9. On or about May 19, 1964 the defendant possessed a number of smoke bombs.

10. On or about July 7, 1964 a meeting was held at 224 Riverside Drive, whereat an armed revolution was discussed.

11. On or about July 16, 1964 the defendant conferred with others.

12. On or about July 17, 1964 the conspirators prepared and distributed a leaflet entitled "Stop the Cops!"

13. On or about July 18, 1964 the defendant made a speech wherein he discussed the killing of cops and judges.

14. On or about July 19, 1964 the defendant discussed the preparation of a "Wanted for Murder" leaflet.

15. On or about July 19, 1964 a second leaflet entitled "Stop the Cops" was prepared and distributed.

16. On or about July 19, 1964 the defendant made a speech wherein he discussed the killing of police officials.

17. On or about July 19, 1964 the defendant discussed the use of Molotov cocktails.

18. On or about July 19, 1964 the defendant discussed on a number of occasions the production of a "Molotov Cocktail" leaflet.

19. On or about July 20, 1964 the defendant distributed copies of a "Wanted for Murder" leaflet.

20. On or about July 20, 1964 the defendant prepared and distributed a leaflet entitled "Organize Your Blocks."

21. On or about July 20, 1964 the defendant discussed starting disturbances in Brooklyn, New York.

22. On or about July 21, 1964 the defendant caused to be printed additional copies of a "Wanted for Murder" leaflet.

23. On or about July 21, 1964 the defendant possessed copies of a leaflet entitled "Stop the Killer Cops Now."

24. On or about July 24, 1964 the defendant prepared a leaflet entitled "Murphy Has Violated Our Constitutional Rights."

25. On or about July 25, 1964 the defendant conferred with others.

Fourth Count:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the defendant of the crime of ADVOCACY OF CRIMINAL ANARCHY, in violation of Section 161 of the Penal Law, committed as follows:

That the said defendant from on or about July 16, 1964, continuously up to on or about July 25, 1964, feloniously did advocate, advise and teach the propriety of overthrowing and overturning the organized government of the State of New York by assassination of the executive officials of the government and by force and violence.

FRANK S. HOGAN
District Attorney

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-358

UNITED STATES OF AMERICA
ex rel. WILLIAM EPTON,

Petitioner,

against

ALBERT NENNA, Warden, Manhattan House of Detention for Men,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-358

UNITED STATES OF AMERICA *ex rel.* WILLIAM EPTON,
Petitioner,

against

ALBERT NENNA, Warden, Manhattan House of Detention for Men,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

Petitioner's Previous Application to This Court

William Epton's petition for a writ of certiorari to review the affirmance of his judgment of conviction by the New York Court of Appeals was denied, and his appeal was dismissed for want of a substantial federal question. 390 U.S. 29 (DOUGLAS, J., dissenting), *rehearing denied,* 390 U.S. 976 (1968). His motion for leave to file a petition for rehearing out of time was denied. 398 U.S. 944 (1970).

Opinions Below

The opinion of the district court (Petition, pp. 18a-37a) is reported at 318 F.Supp. 899. The opinion of the court of appeals (Petition, pp. 1a-12a) has not yet been reported.

Jurisdiction

The order of the court of appeals was entered on June 30, 1971. The petition for a writ of certiorari was filed on August 26, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Was the grand jury that indicted the petitioner unconstitutionally impaneled?

2. Was the petitioner's conviction totally unsupported by evidence, thereby depriving him of due process?

3. Since this Court, in dismissing petitioner's appeal in 1968 on the same record as here, has already either upheld the New York anarchy statutes or determined that their validity should not be reviewed because of the concurrent sentence doctrine, should it now pass upon them in the absence of new facts or law?

4. Are New York's criminal anarchy statutes violative of freedom of speech or unduly vague?

5. Are New York's statutes prohibiting conspiracy to commit the crime of riot constitutionally inapplicable to

speech, in circumstances of clear and present danger of violence?

6. Was the petitioner unconstitutionally prejudiced by the trial court's amendment of the count charging conspiracy to riot?

Statutes Involved

Former N. Y. Penal Law, §160.

Criminal anarchy defined.

Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.

Former N. Y. Penal Law, §161.

Advocacy of criminal anarchy.

Any person who:

1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,

2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form,

containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or,

3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or any state or of any civilized nation having an organized government because of his official character or any other crime, with intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or,

4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine.

Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both.

Former N. Y. Penal Law, §580.

Definition of conspiracy as a misdemeanor.

If two or more persons conspire:

1. To commit a crime * * *

Each of them is guilty of a disdemeanor.

Former N. Y. Penal Law, §2090.

Riot defined.

Whenever three or more persons, having assembled for any purpose, disturb the public peace, by using force or violence to any other person, or to property, or threaten or attempt to commit such disturbance, or to do an unlawful act by the use of force or violence, accompanied with the power of immediate execution of such threat or attempt, they are guilty of riot.

Statement

This is the fifth opportunity that this Court has had to review the judgment in this case. The petitioner's first petition for certiorari was denied, his appeal was dismissed, rehearing was denied and his motion to file a petition for rehearing out of time was denied. The facts supporting his conviction, by now familiar to this Court, are as follows:

On Saturday night, July 18, 1964, the anger of thousands of residents of Harlem in New York City, intensified beyond the breaking point by recent news of the shooting of a youth by a police officer, broke out in riot. For months previously, the petitioner, a leader of a "clandestine" group advocating and preparing for violence against existing government authority, had sought ways to arm and organize the people of Harlem. The issue he had settled on to inflame the people was "police brutality," his proclaimed enemy being the "cops."

When riot erupted, while responsible community leaders ardently strove to restore people to calm and reason, Epton deliberately sought to organize and continue the riots. Busily working with other members of the group, delivering belligerent public speeches and issuing a stream of inflammatory leaflets directed primarily against the police, he openly urged that the police be fought and killed, and suggested methods for doing so. Meanwhile, conniving with others, he planned to distribute Molotov cocktails, to spread the riots, and to keep the rioters inflamed. The rioting ended in mid-week. But the following weekend, petitioner sought to lead a demonstration through the streets of Harlem, with the avowed intent of provoking further violence and renewing the outbreaks, and he was arrested.

The petitioner was indicted for conspiracy to commit riot, riot, conspiracy to commit criminal anarchy and criminal anarchy. The count charging the substantive crime of riot was dismissed by the trial court at the close of the People's case, and the defendant was found guilty on all other charges.

THE EVIDENCE AT EPTON'S TRIAL

The People's Case

Petitioner Epton's activities prior to July, 1964

Detective **Adolph W. Hart**, a member of the Police Department's Bureau of Special Services, testified that he was assigned to join the Harlem branch of the Progressive Labor Movement [P.L.M.] in November, 1963 (328-9, 612-21).* At the P. L. M. offices, 336 Lenox Avenue, he met

* References, unless otherwise indicated, are to the typewritten pages of the trial minutes, the state appeal having been heard on the original typewritten record.

William Epton, president of the Harlem branch of P. L. M., and told him that he wished to join a militant organization (329-30, 621-5). The petitioner told the witness he had "come to the right place, that his organization was militant, unlike CORE or the N. A. A. C. P.; he stated that they will fight and that they carry arms * * *." The P. L. M., the petitioner told Hart, believes in the "Chinese version" of Communism—that social revolution could be accomplished not by a peaceful transformation of government, but only through violence (331-9, 810-23).

In ensuing months, Epton had several conversations with Hart, telling him that "the organization was more or less clandestine and * * * party business could not be discussed with anyone outside the party," and that "they carried firearms * * * [H]e had weapons and * * * would supply the ammunition" (339-40, 642-3, 808-12, 823). Methods of defeating the police during demonstrations were also discussed, as was a proposal to train a cadre of leaders "in military and intellectual ways and means" (337-43, 638-42, 666-8, 736).

At a meeting of New York City members in March 1964, petitioner was elected a vice-chairman of the national P. L. M. (343-7, 633-6). A national program and party constitution was distributed that day; this document noted that "the over-riding historical task for us during the immediate period ahead is to build a Marxist-Leninist Party in this country * * * [i]n its policies dedicated clearly to isolating the ruling class and to expose and undermine the role of the state in our country and the world" (347-8, 352, 355-71, 625-33; Exh. 13). In discussing tactics to be employed in large cities, the documents stated that "neighbor-

hood defense organizations" should be established "to protect the people in the neighborhood from the cops * * * This movement must be aimed at the control of the streets by the people" (368; Exh. 13). Quoting Lenin in a "final note on why we must have a clear program of strategy and tactics," the document stated:

> "Never play with insurrection, but when beginning it firmly realize that you must go to the end. You must concentrate a great superiority of forces at the decisive movement, otherwise the enemy, who has the advantage of better preparation and organization will destroy the insurgents. Once the insurrection has begun, you must act with the greatest determination and by all means without fail, take the offensive * * * and at all costs retain 'moral ascendency' " (371; Exh. 13).

Aside from Hart, the Harlem branch of the Progressive Labor Movement had five members, including Epton and his wife (373, 848-52). In April one of these members, David Douglas [named as a co-conspirator], petitioner's "second-in-command" (373-4), told Hart that Epton had decided to try to organize the Harlem area block by block, starting especially with the teen-agers, with whom he would build up "terrorist bands" eventually powerful enough to "confront the police" (374-5, 379-80, 643-4). A month later, in May, petitioner told Hart that "police brutality would be the hot issue during the coming summer," and in June, Hart discussed the formation of a "Harlem Defense Council" with petitioner, Douglas, and five other persons, petitioner proclaiming that he wished to "mobilize the Harlem area, block by block, with a captain or lieutenant in charge of each block * * * [H]e would begin with simple picket lines procedure to arouse interest in the organization and

gradually work the people up into more militant actions * * * [E]ventually it was his wish to work the people up into a state that they would arm themselves, armed self-defense * * * [against] * * * the police" (382-3, 387-8, 644-9, 654-5, 661-3, 823-4).

Thursday, July 16, 1964—the death of James Powell

It was **stipulated** "that on July 16, 1964, in the daytime, in the East 70's, in the Borough of Manhattan, one James Powell, a fifteen-year-old Negro boy was shot and killed by Thomas Gilligan, a New York City Lieutenant of Police, who was then off duty and in civilian clothes * * * [T]here were several versions of this incident * * * in violent disagreement with each other, which were disseminated shortly after the time of the incident in newspapers and by means of radio and television in New York City, inclusive of the Harlem area of New York City" (883).

On that day, Detective **Hart** testified, letters were sent to prospective members of the Harlem Defense Council asking them to attend a street rally on Saturday afternoon, July 18, and a meeting at the Harlem P. L. M. headquarters on the evening of July 22nd (388-91; Exh. 14). Among "recent events" noted in the letters was one in which:

> "A young (15 year old) Negro youth was shot to death by an off-duty cop this afternoon on East 76th Street. The cop shot the kid once. He fell to the ground. The cop then stood over him and fired two more shots into him and then he kicked the kid after he was dead" (390-1; Exh. 14).

On the next day, at Epton's direction, a leaflet advertising the street meeting was distributed; its headline—"Stop the cops"—was suggested by Hart. The leaflet began:

"Once again the cops have murdered one of our children. They have been killing about one black person a day in New York City" (391-5, 650-4; Exh. 15).

Saturday, July 18—the eve of the riot

Detectives **John Rivera** and **Francis Koopman** testified that using a hidden transmitter and receiver they recorded a public speech made by the petitioner at the corner of 115th Street and Lenox Avenue, beginning at about 5 p.m. on the afternoon of July 18, 1964 (Rivera: 207-31; Koopman: 231-72, 277-316; Exh. 6). They identified in court typewritten transcripts of the recording (Exhs. 2, 3).

Addressing an audience numbering about fifty listeners, Epton spoke of the need for violent action:

"[W]e'll begin a campaign to organize a mass demonstration against the cops somewhere in this city. As it stands now, many organizations are talking and planning of where this demonstration is going to take place and we're not saying it's going to be a peaceful demonstration * * * They [the cops] declared war on us and we should declare war on them and every time they kill one of us damn it, we'll kill one of them and we should start thinking that way right now * * * because we had better stop talking about violence as a dirty word * * *.

"* * * If we're going to be free, and we will not be fully free until we smash this state completely and totally. Destroy and set up a new state of our own choosing and of our own liking. And in that process of making this state, we're going to have to kill a lot of these cops, a lot of these judges, and we'll have to go up against their army. We'll organize our own militia and our own army * * *. Think about it because no people in this world have ever achieved in-

> dependence and freedom through the ballot or having it legislated to them. All people in this world who are free got their freedom through struggle and through revolution. That's the way to gain freedom" (Exhs. 2, 6).

After introducing another speaker, petitioner spoke again, telling his listeners:

> "* * * We will take our freedom. We will take it by any means necessary and any means necessary as we know the beast that we are dealing with is that we have to create a revolution in this country and we will create a new government that is run by the people * * *. Those who are ready to come with us and stand with us and join the Harlem Defense Council * * * will go back into their blocks and organize their blocks into defense committees so when the deal goes through they will be able to be in the street tens of thousands strong ready to face that man. And we know how to use weapons just like they know how to use weapons. And when the deal goes down we have to be ready to confront them and beat them * * *" (Exhs. 3, 6).

Before the rally, Epton had informed Detective **Hart** that if between two hundred and three hundred people attended, he would organize a march to the 32nd Police Precinct on Lenox Avenue to demonstrate against police brutality (395-6). As it turned out, however, no more than a hundred or a hundred and fifty persons gathered at that rally at any one time, and the meeting dispersed without any demonstration or disturbance (Rivera: 225, 227-8; Koopman: 296; Hart: 396-9, 824-7, 852-4). But afterwards petitioner promised future "non-non-violent demonstrations and actions by him in that area" (Hart: 397-9, 852-3, 869-73).

The riot

That evening, July 18, rioting broke out in Harlem; Detective **Hart** saw thousands of persons "milling around" in the area from 110th Street to 135th Street between Lenox and Eighth Avenues (399-403, 827-9). Rocks were thrown at the police, stores were looted, Molotov cocktails hurled from roofs, while the police, trying to disperse the crowds, would charge in, sometimes hurting nonrioters (399-403).

Marc Crawford reported the Harlem riots for *Life* magazine (578-81). He came to Harlem on Sunday, July 19, the day after the rioting began, accompanied by a photographer, and observed events during the following week (581-5, 588-90). On Sunday, this witness saw a meeting in a church, addressed by civil rights leaders, break up "when a bunch of young people ran out of the church * * * heading toward the funeral home where the Powell boy's body was" (585). Thereafter followed "a complete breakdown of law and order" (585). "[A]s the night wore on and the darkness came, people began to jeer, * * * the whole traffic was disrupted" (586). There was shooting; a group of officers would fire in unison over building tops; "[o]ftentimes a bottle would fly from some place and the police would enter a building and clean the building out" (587). The reporter saw men beaten; one man he saw had been shot (587-8). One night during the height of the riots, the photographer accompanying the witness took a picture (Exh. 28) showing a group of youths holding posters exhorting "Wanted for murder—Gilligan the Cop," issued by the Harlem Defense Council (578-80, 1656-7).

Sunday, July 19

On that Sunday, the Harlem headquarters of P. L. M. was busy—Detective **Hart** saw "leaflets of all kinds * * * being run off the mimeograph machine. There were dozens of people in the office in and out, and everyone had suggestions as to how to combat the police in the Harlem area" (403-4). One of the leaflets, produced while the petitioner was present, and headlined "Stop the cops," began "Last night police from all over the city declared war on Harlem"; it invited the public to a meeting at the Harlem P. L. M. Club that night, ending "Those of you who protest the war of genocide being waged on black people should attend this meeting" (404-6; Exh. 16). About two thousand of these leaflets were distributed that day (421-2). Petitioner was at the P. L. M. office, but then left, and when he returned he said "he had been downtown to discuss the strategy that the Harlem Club would utilize during the present crisis" (408). After working in a back room, petitioner joined a group—consisting of William McAdoo, Harold Young [named as co-conspirators], Pernella Wattley and the witness Hart—and the discussion turned to whether a leaflet on Molotov cocktails should be prepared (408, 413-17, 449-53, 674-6, 682-7, 1659-61, 1663-6). Epton said it was "a good idea" but that "whoever printed the leaflet couldn't put their name on it" (408, 413-17). He added, "We couldn't print it here because the bond of paper could easily be traced and our mimeograph machine could also be traced back" (408, 413). That night Hart also walked in on a conversation in the back room between Epton and a person known as "Brother Lewis."

> "Brother Lewis stated that he had twenty to forty Molotov cocktails in the area of 128th Street and

> Lenox Avenue, but that he was having difficulty in moving them around in the area. At this time, William Epton stated that 'We have to get them out of the area'; that it was his wish to start something on the Lower East Side or some other area * * * in Harlem, to spread the police forces out, because they were too well concentrated in Harlem" (417-18).

Then, Hart in the room, Epton and Brother Lewis stopped talking about the Molotov cocktails (418).

Rioting broke out again that evening while the petitioner was holding his public meeting of the Harlem Defense Council at P. L. M. headquarters (407). The rioting outside could be heard and seen while the meeting was conducted (407-8, 422-3). Hart was "in and out" of the meeting room and did not hear the whole speech, but did hear petitioner, while he was addressing about thirty-five or forty people:

> "[He] stated that the people in the area would definitely have to organize to combat the police * * * He stated that there were various means of defeating the police, and one of them was suckering a cop off the main avenue away from the rest of the police, getting him in a side street, killing him and then going home for the night" (406-7, 663-5, 855-6, 873-81).

Patrolman **Frank Johnson** went to the offices of the Progressive Labor Movement at about 9 p.m. on the night of July 19, 1964, while rioting was taking place (884-5). Outside the premises, three or four people were handing out leaflets to passers-by, inviting them to a meeting being held on the second floor (885). The officer, wearing plain clothes, went upstairs, where he saw Epton speaking to a

group of about twenty or twenty-five people (884-5). Epton said:

> "I want to organize the people of Harlem, but not like CORE is organized. I want to organize them in a military manner, each block would have a captain, a block captain, and he would appoint lieutenants, house lieutenants, and so forth * * *
>
> "We already have the block captains * * *. Now, these block captains are being charged with the defense of the block and the instruction of the people" (886).

Asked by one woman in the audience, "How can we fight the cops? We don't have any weapons," petitioner answered:

> "Your block captain can instruct you how to make things, how to make the weapons out of the things on the street * * * You people have been throwing bottles, but once they strike the ground they are useless, but if those bottles are filled with a certain substance they become very effective" (868-7).

Asked to identify the "substance," petitioner said, "You know, if you don't know * * * your block captain can tell you and show you" (887, 889). He refused to go into further detail, saying "You can't tell who is here" (887). Speaking of a rally he scheduled for the following Saturday, Epton said that they would march to the "32nd Precinct, because that precinct has killed more of our brothers than any other."

> "As we march up Lenox Avenue, if the cops try and stop us, we won't fight on the avenues, because they will kill us on the avenues; we will fight in the side streets, the blocks * * *. We will create a disturbance in the side streets and draw the cops off the

> avenues, and then cut them off and then take care of them * * *. We want the State Militia called up" (887-8).

Thereafter, "a large group of people came into the room," and the officer left the meeting (888).

When Epton and Detective **Hart** left the office together that night, Hart "asked [Epton] again about the Molotov cocktails leaflet and he stated that it was one good way of keeping things going until Saturday" (420-1, 688-92).

Monday, July 20

On Monday, Detective **Hart** testified, the P. L. M. office was again "filled with people" asking for various leaflets that were being printed (423). A leaflet entitled "Organize Your Blocks" was prepared, in the petitioner's presence, and this leaflet called for a "mass demonstration" on Saturday, July 25th, with the 32nd Police Precinct to be the objective of the march (423-8, 678-9; Exh. 18). Distributed that day were about 20,000 copies of a poster which Epton had ordered, headlined "Wanted for Murder," picturing and naming the officer whose shooting of a youth had precipitated the riots (439-42; Exh. 19). In a discussion with Hart, Epton stated that "it was his wish to start something over in Brooklyn in an attempt to spread the police forces" (442-4).

Tuesday, July 21

When Detective **Hart** appeared at P. L. M. headquarters on Tuesday, he was wearing a "minifon," a hidden recording device (445-8, 453-5, 521-70, 669-70, 679-81, 747-65). He was, in part, seeking information about Molotov

cocktails leaflets (1661-2). A typewritten transcript of the conversation was identified by the detective at the trial (521-53; Exh. 25). In the recorded conversation, Epton said that the riot "is the greatest thing that's happened in years." Referring to Officer Gilligan, who had shot the youth, Epton noted "They may have to throw him to the wolves. Gilligan was a good man, but—"; with respect to his planned demonstration, he said:

> "Well we've had a lot of opposition from some of the so-called respectable groups. Oh, it's going to lead to nothing but a slaughter, a massacre * * * a massacre. And I called the cops today. I called the Sixth Division that's in charge of it and the Precinct cops and told them that we're having a peaceful demonstration that day" (Exhs. 25, 27, 27A).

Talking again of the scheduled Saturday rally, petitioner said, "Everybody knows what to do in the event the police show up." When someone asked "What about the guns?" petitioner replied "What guns? * * * Oh, I don't know anything about any guns * * * I told you before this is a public office" (Exhs. 25, 27, 27A).

The remainder of the week

Preparations for the Saturday rally intensified. A leaflet was issued depicting a policeman firing a pistol at a boy lying on the ground with his schoolbooks, near a sign reading "School Zone. Quiet." The leaflet was inscribed "Stop the killer cops now" and urged the reader to "join the mass demonstration, Saturday, July 25th, starting at 4 p.m., at 116th Street and Lenox Avenue" (455-7; Exh. 20). On Thursday, July 23rd, petitioner told Detective Hart that at a meeting the previous day he had picked be-

tween thirty and forty "block captains and lieutenants"; the people would join the march and the march would "build up momentum" as it moved up Lenox Avenue toward the 32nd Police Precinct. Epton expected to be arrested, and he hoped the crowd would react violently to his arrest (458-62). "[W]hen they confronted the police they would melt the people into the blocks and get them off the main avenues so that they could do whatever they were going to do within their own blocks" (460-1). When Hart observed that the situation had, by Thursday, "quieted down," Epton "stated that it was all right, just as long as they were preparing for Saturday" (461). On Friday, preparation of signs and leaflets continued (423). After a police officer came to the office to inform petitioner that a permit for the street rally had been denied, petitioner told Hart that "the demonstration would go on regardless" (463-8, 868-9, 875-6).

Saturday, July 25—the petitioner's arrest

Deputy Inspector **Eldridge Waith** held the rank of Captain in July 1964, and during the riots was assigned to supervise detectives and patrolmen in Harlem (835-6). On July 25th, at about 4 p.m., Captain Waith, acting on information received from his superiors and aware of the tension in the community, waited for the petitioner to appear on the corner of Lenox Avenue and 116th Street (836-7, 843-6). There was, at that time, no rioting (842-3). As Epton arrived, accompanied by four or five other men, the Captain approached him, identified himself, and "told him that he wasn't allowed to march; if he persisted in marching, I would have to arrest him" (837). The police officer informed Epton that "his actions had caused a crowd to

collect, would block the walk, and disturb the peace." A large crowd was collecting. There were about twenty policemen in the area (841). But Epton continued on, forming a line of persons six or seven abreast, "and behind them were another file of persons, at least one more file * * * marching, arms locked together" (837-40, 842, 845; Exhs. 39-39C). Warned twice more not to march, petitioner continued leading the crowd, and was arrested for disorderly conduct (837, 846).

The Defense

William Epton, vice president of the Progressive Labor Party—a "Marxist-Leninist organization"—testified that he was born and raised in Harlem (1069-70). The petitioner joined the Communist Party in 1958, as a result of the poor living conditions he had seen in Harlem, but he left the organization in 1962, because "it no longer had a program to resolve those problems" (1075-6, 1186-9, 1201-4). Then he became active in the P.L.M., which "had a program that revolved around the basic issues confronting the American people, as we saw them"—housing, schools, voting, jobs, and police brutality (1070, 1076-7, 1204-6). A local office of P.L.M. was opened at 336 Lenox Avenue, in Harlem (1212-17). Petitioner generally agreed with the theoretical doctrines and philosophy expressed in a prospective draft of the movement's program (Exh. 13) [see pp. 6-9, *supra*], but he did not think that P.L.M. was a revolutionary organization (1182, 1207-12, 1410-24, 1461-8, 1473-4).

The Progressive Labor Movement, petitioner testified, was an open organization, not a clandestine one (1113A). Petitioner first met Adolph Hart in November, 1963, when

Hart walked into the offices of P.L.M. and asked to join the organization (1112). Epton did not recall whether he spoke to Hart of "bloody revolution" in the United States. He did not, however, speak to Hart of tactics to defeat the police, or of supplying and carrying firearms (1113-18). He spoke to Hart about forming a "cadre school" for future P.L.M. leaders, and also about organizing the Harlem Defense Council, a "block by block" organization, but mentioned no plans to organize it along military lines or use teen-agers as terrorists (1134-6, 1254-8).

In about May, 1964, because of police brutality, Epton wished to "organize the people of our community * * *, organize our protests and take [them] to the proper authorities * * *" (1085-93, 1288-9, 1354-5, 1477-8). The main purpose of the street meeting of July 18, 1964, first planned a week previously, was "to organize the people around the issue of police brutality" (1098-1100, 1268-73). However, in applying for a permit to use sound devices at the street meeting, the group stated that the purpose of the meeting was "to discuss the civil rights bill" (1459-61, 1476-7; Exh. 51). Then, two days prior to the already scheduled meeting, the shooting of James Powell occurred (1100, 1136-7).

Petitioner's angry feelings, he testified, were reflected in the remarks he made at his July 18th meeting; he attempted, in the six times he spoke that day, to "put into historical perspective what was happening to the black people [and the white workers] in this country today." He said not only the remarks recorded by the police (Exhs. 2, 3), but also that "in history when people attempted to better their conditions, to better that government that they

felt was oppressive, that in the course of changing that government violence occurred and in the course of that violence people were hurt and injured" (1101-2).

He then told his audience that his proposed demonstration—a march to the 32nd Police Precinct—would not be peaceful, because the police would commit violence against them (1102-3, 1445-52). When he said "every time they kill one of us, damn it, we'll kill one of them," "* * * it wasn't the idea that I was telling the people to go out and kill a cop or to kill anyone. * * * I was saying that we have reached a point where we have to begin * * * rethinking our whole existence in this society and that is why I raised the question that people must begin to think about these things in the future" (1103-4). He did not use the word "kill" to signify the taking of a life (1452-8). When he talked that day of "smashing the state" and killing "a lot of these cops, a lot of these judges," he did not mean to refer to New York State, but to the entire "capitalistic system." But he was not then advocating that anyone "smash" anything—"[W]e have never at any time told people to go out and hurt anyone" (1105-8). Indeed, he claimed, he changed his mind about leading a march to the 32nd Police Precinct on that day because he recognized that

> "Harlem was seething * * * it was a hot Saturday * * * People were indignant, they were mad * * * [W]e would have been creating a dis-service to our community by having that demonstration * * *—the mood of the community was such that it was like a tinderbox ready to explode because of the killing of Powell by Gilligan; so as a result of that we decided not to have that demonstration on the 18th" (1108-10, 1398-9).

The next day, Sunday, July 19, the meeting at P.L.M. headquarters was starting when petitioner arrived, at about 8:45 p.m. (1143-4, 1370-6; Exh. 16).

> "* * * The meeting was an open public meeting; * * * there were some police officers that we knew, that we had seen around the community in civilian clothes, and there were of course those what we didn't know. We had constantly admonished the people that they should be very careful as to what they were saying because this was a public meeting; not only that, because they themselves could easily get into a lot of trouble because they were very warm, they were very mad, incensed, and they would jump up—and many people did during the course of the meeting—made many wild statements about how to kill cops, about how to get Molotov cocktails, how to go get guns * * * All of these suggestions during the course of the meeting that I was chairman, I had pooh-poohed. I told them no, that this was not our program—what we were trying to organize was a peaceful demonstration" (1144-5).

Petitioner testified that someone that night suggested that the police be "ruckered" off the avenue and killed, but he neither said it himself nor agreed with it; there were some "drunks" at the meeting who were making these points (1144-5, 1148). He did not recall whether he said, that night, that "block captains" could instruct the people on how to make weapons, or that bottles "filled with a certain substance" are very effective, or that the police should be drawn into side streets (1468-70). He recalled no conversation with "Brother Lewis" concerning Molotov cocktails (1148).

Most of the petitioner's time from Monday, July 20th, was spent "organizing for the demonstration, for the march of July 25" (1148-9). Informed of the police "ban" of his demonstration, he decided to continue preparations anyway; "we were going to have a peaceful demonstration, we would control the demonstrators, and there would be no trouble at all" (1151-2).

At noon on July 25th, a committee representing seventy-six Harlem organizations asked petitioner to call off the rally, but after petitioner's proposals for a joint rally with these other organizations were rejected, he decided to go on with the demonstration (1156-9). About twenty-five people attempted to march that afternoon (1160-1, 1396-8). As they tried to cross Lenox Avenue at 116th Street, he was arrested (1161-2).

Summing up his alleged attitude towards the riots, petitioner testified that, as a Marxist, when he spoke of "revolutionary change," he understood a change of governmental system which would be successful only if the majority of people in a country decided that they cannot live under the present system (1182-3). Such revolution, he believed, is not imminent in this country "by a long shot" (1183). He had no intention of turning the "senseless destruction" of the Harlem riots of July, 1964 into a revolution, and wanted but to organize the Harlem community so that the people "could best present their grievances to the power structure" (1183-4). Petitioner did not believe or advocate that the State of New York should be brought down by the assassination of public officials (1184-5).

Vivian Anderson, convicted of contempt in a grand jury proceeding concerning this case, was a member of the Progressive Labor Movement, which she joined in September, 1963 (1594-5, 1635-7). She testified that she had never discussed the use of violence, terrorist gangs, or guns with petitioner (1596), had never heard him advocate the assassination of New York State officials or overthrow of the state government, and had never heard him discuss Molotov cocktails (1598-9, 1643-4). This witness was present at the street meeting on the afternoon of July 18th, when Epton spoke, but was "busy" and did not recall much of what he said (1602-3, 1608-22). She was "around the area of the Progressive Labor office" on Sunday evening, July 19th, when Epton held a meeting in the office, but did not go into the meeting to hear him speak (1597-8).

When appearing before the grand jury, she told the truth, but refused to answer questions (1635-7), although petitioner had told her to tell the truth before the grand jury (1635-6).

Pernella Wattley had known William Epton since the spring of 1961, and had occasionally been in the office of the Progressive Labor movement, but was not a member of the organization (1534-5). She contradicted Detective Hart's testimony that she was present at P.L.M. headquarters on July 18 and 19 (1535-7, 1544-5).

Walter Flesh, Bennie Brazier and Mrs. **Phenicia Craig** described instances of police brutality and their discussions of police brutality with petitioner (1479-1507, 1547-72, 1508-12).

Alexander J. Allen, executive director of the New York Urban League, was a member of the committee which urged petitioner to call off the march planned for July 25th (1578-9, 1582). "We were fearful that this might be the kind of spark which would set off additional violence, not that we thought that the march itself was designed for that purpose, but we knew the temper of the community and the temper of the police and we knew that there were a number of signs which indicated that there could be additional conflict" (1582). But Epton told Allen that the march would be peaceful (1586).

Petitioner also produced several character witnesses (1586-93, 1657-8).

Subsequent Proceedings

The jury convicted the petitioner of conspiracy to commit the crime of riot [former New York Penal Law §§580, 2090], conspiracy to commit the crime of advocacy of criminal anarchy [former New York Penal Law §§160, 161, 580] and advocacy of criminal anarchy [former New York Penal Law §§160, 161]. The trial court sentenced him on each count to serve a term of one year in the penitentiary of the City of New York, the sentences to be served concurrently. The judgment was affirmed by the Supreme Court of the State of New York, Appellate Division, First Department, on December 8, 1966 (27 A D 2d 645) and by the Court of Appeals of the State of New York on May 16, 1967. 19 N Y 2d 496. This Court denied certiorari and dismissed the appeal. 390 U.S. 29 (Douglas, J., dissenting), *rehearing denied,* 390 U.S. 976 (1968), *motion for leave to file a petition for rehearing out of time denied,* 398 U.S. 944 (1970).

The petitioner was subsequently released on bail by Judge MARVIN E. FRANKEL of the district court. 281 F. Supp. 388 (S.D.N.Y. 1968). Counsel for both respondent and petitioner agreed that the merits of one of petitioner's claims, that the grand jury which indicted him was unconstitutionally impanelled, would be determined substantially upon the hearing on a similar issue accorded the defendants in the case of *People* v. *Chestnut, et al.* After the decision by the New York Court of Appeals in that case, petitioner's coram nobis claim before the Supreme Court of New York County attacking the composition of the grand jury was denied [CULKIN, J. (June 18, 1970)]. On October 5, 1970, Judge FRANKEL denied the petitioner's petition for a writ of habeas corpus, issued a certificate of probable cause and continued him on bail pending appeal. The court of appeals unanimously affirmed the district court's order on June 30, 1971. By an order entered July 19, 1971, it continued the petitioner on bail pending the determination of his petition to this Court for a writ of certiorari.

Summary of Argument

In a week when violence exploded on the streets of Harlem, petitioner William Epton, culminating months of effort to provoke the people of his community to violent action, sought to spur the rioters to continued fighting and destruction, hoping thereby to render powerless existing authority and to gain leadership in the community for himself and his revolutionary organization, the Progressive Labor Movement. For this inflammatory conduct, he was convicted of conspiracy to commit the crime of riot, conspiracy to commit criminal anarchy, and criminal anarchy.

Petitioner argues that the panel of the New York County Grand Jury which indicted him was impaneled by systematic exclusion of members of the community who were entitled to representation. In so urging, he repeats arguments which were recently rejected in another case by the New York Court of Appeals, after a complete evidentiary hearing in the trial court, in an attack brought by witnesses before the grand jury that was investigating the Harlem riots, petitioner Epton having agreed to rely upon the record of that hearing. *People* v. *Chestnut,* 26 N Y 2d 481 (1970).

The respondent has filed a brief in this Court in opposition to a petition for a writ of certiorari in *United States ex rel. Chestnut et al.* v. *Criminal Court et al.,* No. 71-156, October Term, 1971, discussing identical contentions. We respectfully refer the Court to that brief, three copies of which have been served on petitioner Epton.

Petitioner asserts that there was no evidence whatever of a clear and present danger that his conduct would cause violence or intensify existing violence. Since substantial evidence of petitioner's guilt on all counts consisted of proof of petitioner's conduct classified as "speech," the People were required to prove a clear and present danger that petitioner's conduct would lead to violence or intensify the riots. *Dennis* v. *United States,* 341 U.S. 494 (1951); *Yates* v. *United States,* 354 U.S. 298 (1957). Such evidence was abundant, however.

At a time when tempers in the Harlem community were inflamed by the killing of a Negro youth by a policeman,

Epton urged a street-corner crowd to "stop talking about violence as a dirty word * * *." In "smashing this state," he urged, "we're going to have to kill a lot of cops, a lot of the judges, and we'll have to go up against their army * * *." In his own testimony at trial, he admitted that at this time "Harlem was seething," "a tinderbox ready to explode." After rioting indeed broke out that night, petitioner deliberately sought to increase the violence, planning for distribution of Molotov cocktails, instructions to other in their manufacture and use, and rioting in other parts of the city. In a nocturnal speech at his headquarters, while the sounds of rioting were audible in the background, he called to the angry audience to organize "in a military manner * * *. We already have the block captains," who could "instruct" the citizens "how to make weapons out of the things on the street * * *. You people have been throwing bottles, but once they strike the ground they are useless, but if those bottles are filled with a certain substance they become very effective * * *." While the police were engaged in trying to control rampaging mobs, he counseled "suckering a cop off the main avenue away from the rest of the police, getting him in a side street, killing him and then going home for the night." In the ensuing days of tension, he prepared for a "mass demonstration," ignoring warnings of possible outbreaks, with the purpose of provoking further violence by his own arrest. In sum, this was a classic case of clear and present danger; petitioner shouted for more fire in a "tinderbox" that had already burst into flames.

Petitioner also claims that the New York criminal anarchy statutes violate the First Amendment protection of freedom of speech. This Court, in dismissing the peti-

tioner's appeal in 1968, on the same record as here, decided either that the statutes were valid or else that their validity should not be reviewed under the concurrent sentence doctrine, the petitioner having been convicted of conspiracy to riot in addition to the anarchy convictions and received concurrent sentences on all three convictions. There are no new facts or new law that should move this Court to change its 1968 ruling. Moreover, the concurrent sentence doctrine has recently been followed by this Court. *Burton* v. *New York*, 402 U.S. 991 (1971).

In any event, the anarchy statutes are valid. They have long been construed to cover only intentional, not abstract advocacy. *People* v. *Gitlow*, 234 N.Y. 132 (1922), *affirmed*, 268 U.S. 652 (1925); see *Dennis* v. *United States*, *supra*; *Yates* v. *United States*, *supra*. The trial court charged the jury accordingly. Further, the case was submitted to the jury under the clear-and-present-danger test, the Court of Appeals likewise applied that test, and the proof in fulfillment of that standard was clear. *Bryson* v. *United States*, 396 U.S. 64, 69 (1969).

Although, as the dissenting Judge in the New York Court of Appeals pointed out, the New York Court of Appeals formerly had rejected the clear and present danger test [*People* v. *Gitlow*, *supra*], and then adopted it here, petitioner received adequate notice that his conduct was covered by the anarchy law. The clear and present danger standard had been announced by the United States Supreme Court in the *Dennis* case, which involved a statute patterned after the New York law, and thereafter the New York anarchy statute remained on the books unaltered.

The elements of the crime remained the same, the only change being the new limitation on the conditions under which the statute could constitutionally be applied. Petitioner was surely on notice that the *Dennis* test, applied to a statute indistinguishable from New York's, would have to be adopted by the New York courts. Moreover, petitioner's conduct was of the "hard core" type to which any reasonable construction of the statute would apply. *Williams* v. *United States*, 341 U.S. 97, 104 (1951).

Petitioner, turning to his conviction for conspiracy to commit riot, claims that this conviction was based entirely on evidence of speech, and therefore deprived him of freedom of speech. As pointed out by the district court, however, this was a misstatement of the facts because the petitioner also engaged in "unprotected acts," acts upon which the prosecution's case heavily relied. Moreover, the trial jury and the New York Court of Appeals found the evidence, including words, to establish a "clear and present danger" of riot.

Finally, the petitioner discerns a denial of due process in the court's amendment of the count charging conspiracy to riot. The change, after all the evidence had been presented, from "which disturbed" to "which would disturb" the public peace was a mere semantic one to clarify the charge for the jury, and in no way affected the proof of the crime or prejudiced the defense.

ARGUMENT

POINT I

The grand jury that indicted the petitioner was lawfully impaneled without purposeful or intentional exclusion of any element of the community entitled to representation.

Petitioner attempted to challenge the grand jury statutes in his prior petition, although the validity of the statutes had not been raised in the New York Court of Appeals or passed on by that Court. For the reasons stated in respondent's brief filed in opposition to a petition for a writ of certiorari in *United States ex rel. Chestnut et al.* v. *Criminal Court et al.*, No. 71-156, October Term, 1971, it is clear that the grand jury that indicted the petitioner was not impaneled in violation of the Constitution. We respectfully refer the Court to that brief, and have served three copies of it upon petitioner.

POINT II

The verdict was fully supported by evidence, petitioner's guilt having been proved beyond a reasonable doubt.

The charges against petitioner were submitted to the jury on the theory that evidence of a clear and present danger of violence was required to support a verdict of guilty. Petitioner contends, as he did in his first petition for certiorari, that there was no evidence whatever of a clear and present danger of the overthrow or attempted overthrow of the government of the State of New York. Such evidence was abundant, however.

The evidence clearly established, first, petitioner's direction of a conspiracy to promote and continue the existing riots [former N.Y. Penal Law, §§580, 2090, 2091]—a conspiracy directed principally against the police—under circumstances of a clear and present danger that his utterances would contribute to and intensify existing violence. Before the riots broke out, Epton predicted that "police brutality would be the hot issue during the coming summer" (388). To exploit this controversy, he organized a group entitled the "Harlem Defense Council" which he hoped to "mobilize" against the police (374-88). So, when a youth, James Powell, was shot by police officer Gilligan on July 16, 1964 (883), Epton prepared for general violence. Addressing a crowd on a street corner two days later, knowing that tempers had been inflamed by the recent shooting, he urged his audience to "* * * stop talking about violence as a dirty word. * * * [I]n that process of smashing this state, we're going to have to kill a lot of these cops, and of these judges, and we'll have to go up against their army —We'll organize our own militia and our own army * * *" (388-99; Exhs. 2, 3, 6). Though the people he addressed that afternoon dispersed peacefully, petitioner's wish to see violence in the streets came true that night when full-scale rioting erupted over a large area of Harlem (225, 227-8, 296, 399-403, 578-88; Exh. 28). While looters smashed into stores, other rioters disrupted traffic, threw rocks at the police, and hurled "Molotov cocktails"—home-made incendiary bombs—from roofs (399-403, 585-7); there was "a complete breakdown of law and order" (585). At the height of the riots, posters proclaiming "Gilligan—wanted for murder," distributed by the petitioner's organization, were displayed as a symbol of defiance (578-80, 1145-7; Exh. 28).

From that time on, and for the rest of the week, petitioner worked hectically to fan the flames of disorder. Privately, with his followers, he made plans to spread out and weaken the police forces by provoking riots in other areas of the city and by distributing Molotov cocktails (417-18, 442-4). Publicly, he and his organization continuously issued and circulated leaflets inspiring hatred of the police, pointing to the police force as a military enemy to be fought violently and beaten (403-6, 413-17, 420-42, 455-7, 462-6, Exhs. 16, 18-22). In a speech at his headquarters, while the sounds of riot could be heard, petitioner told his heated audience he wanted "to organize the people of Harlem * * * in a military manner, each block would have a captain. * * * We already have the block captains. * * * Your block captain can instruct you * * * how to make weapons out of the things on the street. * * * You people have been throwing bottles, but once they strike the ground they are useless, but if those bottles are filled with a certain substance they become very effective. * * * [I]f you don't know [what to fill them with] * * * your block captain can tell you and show you" (886-7, 889). That night he also instructed his audience that "there were various means of defeating the police, and one of them was suckering a cop off the main avenue away from the rest of the police, getting him in a side street, killing him and then going home for the night" (406-8, 422-3, 663-5, 855-6, 873-8, 884-8). He wanted the fighting so intensified that the state milita would be called into action (887-8).

Later in the week, as the riots died down despite his efforts to "keep things going," Epton planned and publicized another street demonstration—a march to a Harlem

police station (420-1, 455-69). Cynically, he told those respected persons who asked him to call off the march that his demonstration would be a peaceful one, but privately he assured his followers that he sought and expected to cause the outbreak of more street violence (458-68; Exhs. 25, 27, 27A).

Testifying in his own defense, Epton conceded having engaged in most of the described activities during the week of riot—denying only that he made plans to arm the rioters, distribute Molotov cocktails, or publicize the way to make the bombs (1141-56, 1162-85). But he absurdly insisted that he did not always mean what he said. For instance, when he mentioned, in his talk, suggestions on the use of violence, he was just "fluffing them off"; when he used the word "kill," he did not mean to signify the taking of a life (1101-10, 1141-8, 1162-85, 1452-8, 14[illegible]-70).

The evil of petitioner's intent, and the error of his present claim of utter lack of evidence of clear and present danger, are further demonstrated by his admission on the stand that on July 18, the eve of the riots, he knew that "Harlem was seething," that it was "a tinderbox ready to explode," and that because of this any plan to lead a protest march to a police station would have been a "disservice to the community" (1108-10, 1398-9). Yet, after the riots erupted, Epton devoted his energies to leading another protest march, the next week, under even more provocative circumstances (1148-62). The widespread hysteria in the community, and the potential for more conflict were corroborated by another defense witness, Mr. Allen (1582-6). Having missed the first opportunity to take command of a riot, Epton wanted to try again. Fortunately, however,

calm had returned and Epton and his followers could stimulate no further disorder. If, as petitioner claims, there was no proof that his conduct caused violence, this should not be confused with the absence of a danger.

Thus, the proof of petitioner's leadership of a conspiracy to promote further rioting in an already violent situation was overwhelming. These same facts, coupled with the evidence that petitioner, long advocating the necessity of the overthrow of government by force (382-469), called for violence during these riots for the purpose of destroying the authority of the existing government in the locality, proved as well the crimes of criminal anarchy and conspiracy to commit criminal anarchy. Former N.Y. Penal Law §§160, 161, 580.

POINT III

The validity of the state anarchy statutes need not be reviewed; and in any event, these statutes are constitutional.

Appellant was convicted of conspiracy to commit the crime of riot [former N.Y. Penal Law §§580, 2090], conspiracy to commit the crime of advocacy of criminal anarchy [former N.Y. Penal Law §§160, 161, 580], and advocacy of criminal anarchy [former N.Y. Penal Law §§160, 161]. He was sentenced on each count to serve a term of one year in the penitentiary of the City of New York, the sentences to be served concurrently.

Although the New York Court of Appeals held the anarchy statutes constitutional (19 NY2d 496 (1967)), this

Court dismissed the appeal when petitioner previously attacked them before this Court and the lower federal courts therefore considered themselves foreclosed from reviewing them. As District Judge FRANKEL soundly reasoned, when this Court dismissed the appeal, it had either held the anarchy statutes to be constitutional or held that the issue should not be reached because the sentences for anarchy were concurrent with the sentence for violation of the riot statute, which was not challenged by petitioner (Petition, pp. 28a-32a). *See Samuels* v. *Mackell,* 288 F. Supp. 348, 354 n. 6 (S.D.N.Y. 1968) (FRIENDLY, J., for 3-judge court), *aff'd on other grounds,* 401 U.S. 66 (1971); *Epton* v. *New York,* 390 U.S. 29 (1968), concurring opinion, STEWART, J.; *Lanza* v. *New York,* 370 U.S. 139 (1962); *Hirabayashi* v. *United States,* 320 U.S. 81, 85 (1943).

Petitioner argues, however, that after the dismissal of his appeal, this Court later overruled the concurrent sentence doctrine in *Benton* v. *Maryland,* 395 U.S. 784 (1969). The district court correctly held that even assuming that to be the case, Epton could not retroactively benefit from it, citing *Gaines* v. *Rugg,* 148 U.S. 228, 244 (1893). The district court further stated that the doctrine had not been eliminated by this Court as a rule of convenience and that, indeed, the circuit court below and other circuit courts, have on a number of occasions subsequent to *Benton,* used the doctrine of concurrent sentences in deciding not to reach an issue. As the district court wisely concluded, "If it is discretionary whether the concurrent sentence doctrine will apply despite the disposition by the Supreme Court almost three years ago, the appeal must lie to the discretion of that Court, not this one" (Petition, p. 32a).

The court of appeals adopted the same position (Petition, p. 7a). A recent decision by this Court dismissing an appeal because concurrent sentences had been imposed vindicates the courts below and shows that the doctrine of concurrent sentences has continuing validity. *Burton* v. *New York,* 402 U.S. 991 (1971). Since petitioner has shown no ground for altering this Court's disposition of his case in 1968, certiorari should again be denied.

In any event, the anarchy statutes are constitutional. Section 160 of the former New York Penal Law defines "criminal anarchy" as "the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means." Section 161 of the former New York Penal Law proscribes the advocacy of criminal anarchy by speech or writing, or by organizing any group or assembly of persons formed to teach or advocate such doctrine. These statutes were upheld as constitutional in *Gitlow* v. *New York,* 268 U.S. 652 (1925), *affirming* 234 N.Y. 132 (1922). Petitioner contends that they are void for vagueness, and violate freedom of speech.

The reasonable construction of a statute so as to conform it to the Constitution and preserve its validity is a basic principle of statutory interpretation. Indeed, this Court has followed the principle in construing a federal enactment virtually identical to New York's criminal anarchy statute. *Dennis* v. *United States,* 341 U.S. 494 (1951); *Yates* v. *United States,* 354 U.S. 298 (1957). Thus, the trial court in the instant case properly instructed the jury that Sections 160 and 161 of the Penal Law outlaw

only an intentional call to action under circumstances of clear and present danger, excluding mere advocacy of doctrine from the scope of the statute (1915-18, 1921-7, 1959-72, 1982-90, 1998). The New York Court of Appeals reaffirmed this interpretation in its opinion. So defined, these statutes are unquestionably valid. See *Samuels* v. *Mackell, supra,* 288 F.Supp. at 352-3.

The distinction between advocacy of doctrine and intentional advocacy of action has been recognized as part of the New York statutes since the *Gitlow* case itself. In *Gitlow* v. *New York, supra,* this Court noted with approval that the trial court had charged the jury to "determine what was the intent, purpose and fair meaning" of the defendant's writing. 268 U.S. at 661. Construing the statute, the majority opinion stated:

> "The statute does not penalize the utterance or publication of abstract 'doctrine' or academic discussion having no quality of incitement to any concrete action. * * * It is not the abstract 'doctrine' of overthrowing organized government by unlawful means which is denounced by the statute, but the advocacy of action for the accomplishment of that purpose." *Id.* at 664-5.

Similarly, in *Yates* v. *United States, supra,* this Court construed the Smith Act—a federal enactment "nearly identical" to the New York criminal anarchy statutes—to contain implicitly the distinction between advocacy of doctrine and of action; the Court noted that "This distinction was heavily underscored in *Gitlow* v. *New York.* * * *" And this Court was able to read the distinction into the Smith Act, in good part, because New York's

criminal anarchy law was "the prototype" for the federal statute. *Yates* v. *United States, supra* at 318-320.

The majority in *Gitlow,* however, upheld the constitutionality of the New York statutes without limiting their applicability to instances of clear and present danger, thereby taking "a narrow view * * * of the First Amendment." *Yates* v. *United States, supra.* The views of Mr. Justice Holmes, dissenting in *Gitlow,* are now generally accepted. *Dennis* v. *United States,* 341 U.S. 494, 507 (1951). But by no means may this development of constitutional rights be taken to mean that the statutes upheld in *Gitlow* are now unconstitutional. Rather, Mr. Justice Holmes's dissent itself indicated that the statutes are constitutionally valid, if their applicability is limited to instances of "clear and present danger," as was done in this case:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the state] has a right to prevent." *Gitlow* v. *New York, supra* at 672-673 (dissent).

Accordingly, a generation later, with reference to the Smith Act, which in its language makes no mention of "clear and present danger," this Court stated:

> "The question in this case is whether the statute which the legislature has enacted may be constitutionally applied. In other words, the Court must examine judicially the application of the statute to the particular situation, to ascertain if the Constitution prohibits the conviction. We hold that the statute may be applied where there is a 'clear and present danger' of the substantive evil which the legislature had the

> right to prevent * * * We see no difference from the standpoint of vagueness, whether the standard of 'clear and present danger' is one contained in haec verba within the statute, or whether it is the judicial measure of constitutional applicability." *Dennis* v. *United States,* 341 U.S. 494, 514-515 (1951).

By "clear and present danger," this Court did not indicate that the government must actually face overthrow, but that the proscribed advocacy takes place under circumstances "such as reasonably to justify apprehension that action will occur." *Yates* v. *United States, supra* at 321; *Dennis* v. *United States, supra* at 509-511.

The petitioner, however, citing *Brandenberg* v. *Ohio,* 395 U.S. 444 (1969), complains that the trial court failed, in its charge to the jury on anarchy, to include "incitement to imminent lawless action" (*id.,* at 449). That the proscribed advocacy constitute a call to action is, of course, an element in the crime of criminal anarchy. The trial court here properly instructed the jury that Sections 160 and 161 of the Penal Law outlaw only an intentional call to action under circumstances of clear and present danger, excluding mere advocacy of doctrine from the scope of the statute (1915-18, 1921-7, 1959-72, 1982-90, 1998). The New York Court of Appeals reaffirmed this interpretation in its opinion. *Bryson* v. *United States,* 396 U.S. 64, 69 (1969).

Petitioner contends, however, that the trial court's charge to the jury on the question whether a clear and present danger of violence existed was inadequate. But petitioner took no exception to the charge on clear and present danger at any time before the jury reached its verdict (1972-3) [see N.Y. Code Crim. Proc. §420-a]; his objection to the charge was first heard a month later, at

the time of sentencing (2072-4). Rather, at the time the court charged the jury, petitioner requested that the jury be instructed to consider whether he had agreed with others that his advocacy of overthrow of government would take place "under circumstances such as to lead to a probability that it would inspire persons to take action toward the overthrow of the government of the State of New York by using force and violence * * *" (2017-18; see also 2028); the court so charged (1963-4).

The petitioner, then, may claim no privileged advocacy of political "ideas" that are, in fact, a call to violent action at a time and in a place where violence is already present. Worse than falsely shouting fire in a theatre [*cf. Schenk* v. *United States,* 249 U.S. 47 (1919)], petitioner called for more explosions from a "tinderbox" already aflame (1109). As Mr. Justice DOUGLAS stated in a hypothesis now tragically come true:

> "If this were a case where those who claimed protection under the First Amendment were teaching * * * the planting of bombs, the art of street warfare, and the like, I would have no doubts. The freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale along with obscenity and immorality." *Dennis* v. *United States, supra* at 581 (dissent).

Petitioner further contends that the adoption of a "new" construction of the state anarchy statute by the New York Court of Appeals in this case deprived him of due process. In *People* v. *Gitlow, supra,* the state court had already construed the statute to apply only to deliberate, intentional advocacy, not to theoretical, abstract advocacy; the decision in the instant case added nothing new in this

respect. But the clear-and-present-danger test was rejected by the Court of Appeals and this Court in *Gitlow,* and was not expressly announced as applicable to the New York statute until the trial court's charge to the jury in the case at bar, which was reaffirmed in the appellate opinion. Petitioner urges, as did Judge Burke in dissent in the New York Court of Appeals, that he was not given adequate notice of the statute's meaning. That Court properly rejected this argument.

While it is true, as petitioner urges, that a penal statute must give adequate notice of the conduct proscribed—of the elements of the crime—the clear-and-present-danger test is not an element of the crime, but a "judicial measure of constitutional applicability," a standard as to when certain conduct set forth in a statute may constitutionally be punished. See *Dennis* v. *United States, supra,* 341 U.S. at 514-515. Indeed, at a jury trial for criminal anarchy the trial court alone may rule on the issue of clear and present danger. *Id.* at 513. Thus, the *Dennis* and *Yates* decisions, while limiting the circumstances under which advocacy of anarchy could be prohibited, did not re-define the conduct itself. Analogously, in *Ginzburg* v. *United States,* 383 U.S. 463 (1966), this Court applied to federal obscenity statutes a new test of evidence, looking to the circumstances under which publications were advertised and distributed, to determine whether they were obscene. While broadening previously announced rules as to the applicability of the obscenity test, the change did not, in the view of the majority of the Court, deprive the defendant of the adequate notice.

Moreover, as the Court of Appeals pointed out in this case, Sections 160 and 161 of the New York Penal Law

have remained on the books since the *Dennis* decision, and no change has occurred in the statute on its face.* The Court of Appeals has consistently applied the presumption that the legislature intends to enact statutes which are in harmony with the Constitution; therefore, petitioner was on notice of the clear obligation of New York courts to construe the anarchy statute in accordance with sound constitutional principles. See *Samuels* v. *Mackell, supra* at 354-5.** He had no right to rely on an assumption that the courts would hold the statutes unconstitutional. *Scales* v. *United States*, 367 U.S. 203, 224 (1961). In short, the conduct charged in the indictment was "within the reach of an acceptable limiting construction readily to be anticipated as the result of a single criminal prosecution." See *Dombrowski* v. *Pfister*, 380 U.S. 479, 491 (1964). Provided there is fair warning, "once an acceptable limiting construction is obtained, it may be applied to conduct occurring prior to the construction." *Id.* at 491 n. 7. Moreover, petitioner's deliberate lighting of a spark in a "tinderbox ready to explode" (as he later described the neighborhood at trial) was "the sort of 'hard-

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* In 1965 the state legislature enacted a Revised Penal Law, effective September 1, 1967, which carried over the former anarchy statute as follows:

> "§240.15 Criminal anarchy
>
> "A person is guilty of criminal anarchy when (a) he advocates the overthrow of the existing form of government of this state by violence, or (b) with knowledge of its contents, he publishes, sells or distributes any document which advocates such violent overthrow, or (c) with knowledge of its purpose, he becomes a member of any organization which advocates such violent overthrow * * *."

** As Judge FRIENDLY there stated where the defendants challenged the validity of the anarchy statutes, "No court of New York had ever told the defendants they could engage in the type of activity charged in the indictment with impunity * * * [There was no evidence that the defendants] entertained the beliefs their lawyers now ingeniously impute to them * * *."

core' conduct that would obviously be prohibited under any construction of the statute." *Id.* at 491-492; see *Samuels* v. *Mackell, supra* at 354. Hence, the claim of vagueness is without merit. *Williams* v. *United States,* 341 U.S. 97, 104 (1951); *Scales* v. *United States, supra* at 223.

Petitioner argues, however, that the criminal anarchy statutes have effectively been declared unconstitutional in the case of *Keyishian* v. *Board of Regents of the State of New York,* 385 U.S. 589 (1967). *Keyishian* dealt with Section 3021 of New York's Education Law and Section 105 of the New York Civil Service Law. These two statutes disqualified from civil service any teaching persons who uttered "seditious" words or did "seditious" acts. The term "seditious" was equated with criminal anarchy as defined by the Penal Law. *Id.* at 598-3. In analyzing the civil service statutes, this Court found that the reference to the Penal Law definition was uncertain, and therefore held the civil service statutes to be unconstitutionally vague. This pronouncement has no effect, however, on the instant prosecution, where the petitioner was tried for his acts under the safeguards and standards of the criminal law. *Cf. Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 69-70 (1963).

In *Keyishian,* a declaratory judgment action, this Court had before it an entire statutory scheme of administrative regulation without benefit of specific application, or of interpretation by the courts of this State. Thus, this Court dealt with all possible ramifications of the civil service statutes, noting the uncertainty as to whether all the provisions of Section 161 of the Penal Law were incorporated into the civil service laws at issue. "If so," this Court noted, "the possible scope of 'seditious' utterance or acts

has virtually no limit.'' For example, citing the least defensible subdivision of Section 161, one not involved in the instant case, this Court referred to the possibility that ''the teacher who carries a copy of the Communist Manifesto on a public street'' could be affected by the wording of subdivision 2 of Section 161 of the Penal Law, as incorporated into the Civil Service Law. This Court concluded that this language had the effect of stiffling the ability of teachers and others to speak freely. *Id.* at 601. This consideration does not apply to the instant case, where a conviction has been obtained under a specific indictment, charging acts which, under any view of the applicable law, could not be constitutionally privileged, and after a trial in which the specific criminal provision under which defendant was indicted [former N.Y. Penal Law, §161(1)] was clearly and narrowly construed by appellate courts previously and by the trial judge in the case at bar. Here, ''the Court must examine judicially the application of the statute to the particular situation, to ascertain if the Constitution prohibits the conviction.'' *Dennis* v. *United States, supra; cf. Dombrowski* v. *Pfister, supra* at 490-492.

Further, and most significantly, the civil service statutes at issue in *Keyishian* did not simply render removal from public employment contingent on the actual commission of the crime of criminal anarchy; one was subject to discharge merely on ''utterance'' of seditious words or the ''doing'' of seditious acts. This Court was, therefore, concerned with the ''indefinite'' scope of the Penal Law's definition of criminal anarchy [former N.Y. Penal Law §160], when applied to the civil service laws there at issue. ''The teacher,'' this Court stated, ''cannot know the extent, if any, to which a 'seditious' utterance must transcend mere

statement about abstract doctrine, the extent to which it must be intended to and tend to indoctrinate or incite to action in furtherance of the defined doctrine. The crucial consideration is that no teacher can know just where the line is drawn between 'seditious' and nonseditious utterances and acts." *Id.* at 599. But a defendant's seditious intent is a basic element of the crime of criminal anarchy, as is the requirement that the proscribed language constitute a call to illegal action. *Gitlow* v. *New York, supra; Yates* v. *United States, supra.* Thus, in discussing this fatal weakness of the civil service statutes, the *Keyishian* opinion by no means invalidated this State's criminal provisions on sedition.

POINT IV

The conviction for conspiracy to commit the crime of riot did not violate the First Amendment.

Petitioner, turning to the conviction for conspiracy to commit the crime of riot, asserts, as he did in his first petition for certiorari, that this conviction was based entirely on evidence of speech and expression of ideas, and therefore deprived him of freedom of speech. Although considerable conspiratorial conduct proved at trial, such as petitioner's planning to prepare and distribute instructions for making Molotov cocktails, and to intensify the rioting, were not protected speech, substantial proof against the petitioner on this count consisted of his harangues, or of other utterances to which the First Amendment might well apply. However, as the New York Court of Appeals pointed out, the clear-and-present-danger test was satisfied (19 NY2d 496 (1967)); therefore, the First Amendment was not violated. *Yates* v. *United States,* 354 U.S. 298 (1957); *Dennis* v. *United States,* 341 U.S. 494

(1951). The courts below also found that the test had been met.

Furthermore, as was found by the district court,

> "* * *[P]etitioner misstates the facts. As was noted when the case was in the Supreme Court, the evidence in question included evidence of conduct outside the sphere of the First Amendment. See 390 U.S. at 29-30 fn. (Stewart, J., concurring); *id.* at 33 n. 2 (Douglas, J., dissenting). Not only was there such 'unprotected' evidence; it was evidently central to the prosecution's case in terms of emphasis and potential impact on the jury. It included, for example, evidence of Epton's guidance to an assemblage on 'suckering' policemen onto side streets to kill them; his instructions on manufacture and use of weapons for street warfare; his planning of demonstrations and other events, not to convey ideas; but as occasions and techniques for the fomenting of physical violence. These were the kinds of things—evidence of efforts to promote 'guerilla warfare,' 'terrorism,' 'killing'—that were relied upon in page after page of the prosecution's summation, the whole thrust of which was to dispel the claim that Epton had been engaged in peaceful persuasion and to show instead that 'the important evidence' (Tr. 1803) demonstrated Epton's purpose directly and immediately to get people in Harlem to 'start rioting, continue to riot, and * * * keep the situation fired up.' (Tr. 1813). These are the realistically major and critical materials on which the New York Court of Appeals, unanimous in this respect, found the evidence, including words, to establish a '"clear and present danger" of riot.' 19 N.Y. 2d at 507[9]" (Petition, p. 34a).

"9. In his brief to the New York Court of Appeals (p. 69), petitioner insisted that the question of clear and present danger is one 'for the court alone,' and that the trial judge had erred in giving it to the jury."

The court of appeals, after quoting from one of petitioner's speeches about killing and violence, remarked,

> "We have great difficulty with the view that it is improper to use this language as a proof of an overt act in furtherance of a conspiracy to riot" (Petition, p. 9a).

Moreover, Mr. Justice STEWART, in his opinion concurring in the dismissal of Epton's appeal to this Court, and the denial of certiorari, felt that the riot conviction presented no substantial federal question. He found that:

> "* * * the State in these cases presented proof that Epton had actively participated in the formation of a group dedicated to armed revolt against the police under the direction of 'block captains' and with the assistance of 'terrorist bands,' equipped with Molotov cocktails that Epton himself had explained how to use. In the context of this record, activities such as these can make no serious claim to constitutional protection." *Epton* v. *New York,* 390 U.S. 29, 29-30 n. † (1968).

Finally, petitioner adds to his argument in the first petition the claim that the jury had not been warned against convicting him solely on protected speech (Petition, p. 16). This is a point raised by Mr. Justice DOUGLAS in his dissent in *Epton* v. *New York, supra* at 34 n. 2. The district court, however, disposed of Epton's claim by noting that:

> "(1) there is no claim that any such limiting instruction was ever requested;
>
> (2) petitioner never claimed error in the failure to give such an instruction in his brief to the New York Court of Appeals, his petition for certiorari or his jurisdictional statement;

(3) the absence of a request or argument on direct appeal is perfectly understandable since it seems plain that the jury, as a matter of fact, would not have convicted unless it had focussed precisely on the steadily emphasized evidence of unprotected overt acts." (Petition, p. 35a).

The court of appeals agreed "with the district court's ultimate conclusions on these issues" (Petition, p. 8a).

And, as pointed out under Point III, *supra,* the trial court specifically instructed the jury that the petitioner's acts, to be unlawful, had to constitute a clear-and-present danger. Thus, it is inconceivable that the jury, with such instructions, would have convicted the petitioner for his acts, however they are denominated, absent a clear-and-present danger.

POINT V

The petitioner was not denied due process by the court's amendment of the count charging conspiracy to riot.

As originally written, the first count of the indictment, charging the petitioner with conspiracy to riot, alleged that he and others agreed to participate in a riot by promoting and counseling an assembly of more than three persons "which disturbed the public peace by using force and violence to police officers of the City of New York." After all the evidence had been presented and before the summations, the defense argued that the count was fatally defective in that it charged not conspiracy but a completed riot, since it alleged an agreement to instigate riot which actually had "disturbed the public peace * * *" (1675-9). The argument was a semantic one. The court noted, "I am

going to read that language as if it said 'which would disturb' because that's the only way it makes sense" (1679). Then, over defense counsel's frivolous objection that the change was substantial, the court granted the People's motion to amend the count of the indictment reading "which disturbed" to "which would disturb" (1679-80). The petitioner, at the time, made no claim that this change in any way affected the presentation of his case (1679-80, 2048-51), nor does he do so in his present brief.

The petitioner apparently asserts, as he did in his first certiorari petition, that the change harmed him because, as written, the indictment required the People to prove that his acts had actually caused a riot. The authorities he cites in support of his position are not in point. The first count of the indictment, with its specification of fifteen overt acts, clearly charged conspiracy and no other crime. As is well known and well established, the crime of conspiracy connotes conspiratorial acts for future criminal purposes, and phraseology in a conspiracy indictment that indicates that the planned crime has been committed is superfluous. "The overt acts, alleged in an indictment, which constitute a felony may, upon the trial, become immaterial, or the prosecution may be unable to establish them * * * Nevertheless, there may be a conviction if some overt act charged is established. In such a case the offender can be punished for the crime of conspiracy." *People* v. *Tavormina,* 257 N.Y. 84, 93 (1931). "A conviction for the conspiracy may be had though the substantive offense was completed." *Pinkerton* v. *United States,* 328 U.S. 640, 643 (1946). As was stated by the district court, the trial judge's verbal change merely made "somewhat clearer this elementary distinction" (Petition, p. 33a). The court of appeals found

that it was "a minor change of grammatical tense and clarified the issue for the jury" (Petition, p. 11a). The amendment of the indictment to specify that the object of the conspiracy lay in the future constituted, therefore, merely a minor change of grammatical tense, in no way affecting the proof of the crime or otherwise prejudicing the defense. N.Y. Code Crim. Proc. §§285, 293. It was wholly permissible by federal standards because it narrowed the issue that the petitioner was called on to meet. *Thomas* v. *United States,* 398 F.2d 531, 539 (5th Cir. 1967). As found by the court below, "[e]ven if the indictment had not been clarified, Epton could properly have been convicted of conspiracy[14]" (Petition, pp. 11a-12a).

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September, 1971

"14. Of course, well before this ruling was made, the substantive charge of riot against Epton had already been dismissed by the trial judge, thereby eliminating any confusion of the issue submitted to the jury on the conspiracy to riot count."

SUPREME COURT, U.S.

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 358

UNITED STATES OF AMERICA *ex rel.* WILLIAM EPTON,

Petitioner,

—against—

ALBERT NENNA, Warden, Manhattan House of Detention for Men,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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It is now seven years since the so-called Harlem riots of July, 1964. The reported violence of those riots pales in the light of domestic history in the intervening period and raises additional doubts as to the correctness of the conviction of petitioner, who was no more than remotely connected to those riots.

William Epton was never physically present at any scene of violence nor were his actions connected in any way to any of the disturbances which actually took place in Harlem. Yet, Epton was the only person to be convicted of a serious crime in the aftermath of July, 1964 in New York. His conviction in January, 1966 for anarchy, for conspiracy to riot and for conspiracy to advocate criminal anarchy and its affirmance in May, 1967 by the

New York Court of Appeals, in an opinion which cavalierly cuts across the line of decisions by this Court since *Gitlow* v. *New York,* 268 U.S. 652 (1925), have alarmed and disturbed legal scholars [see Pet. pp. 6, 7]. The unusual expressions of opinion, both pro and con, that accompanied the refusal of this Court to hear the case in January, 1968 [390 U.S. 29] and this Court's careful abstention (after three arguments) as to the merits of basic issues in Epton when confronted with them in *Samuels* v. *Mackell,* 401 U.S. 66 (1971) mark those issues as substantial. It is also understandable that the troubled lower courts would affirm the status quo (although understandably extending bail) in the expressed hope that this Court will at last reach the merits of the issues.

Respondent has furnished this Court with fifty-one pages[1] of rebuttal to the Petition; the so-called rebutal amounts to an attempt to prejudice the Court against the petitioner with material loosely related to the record before the Court and to downgrade the constitutional issues before the Court in this case, issues involving fundamental considerations of due process and the First Amendment which have always been the lively concern of this Court. Nonetheless, even as posed by the respondent, the issues assert their importance.

1. *Was the grand jury that indicted the petitioner unconstitutionally impaneled?* [Resp. Br. pp. 2, 31]

This Court has on October 12, 1971 denied review in *U. S. ex rel. Chestnut* v. *Criminal Court,* —— U.S. ——, where the only issue presented was the constitutionality

[1] Respondent filed an additional twenty-seven pages in discussing Point I, the grand jury issue in *United States ex rel. Chestnut* v. *Criminal Court,* OT 1971 Misc.

of the composition of the grand jury which indicted the petitioner. The reason for the refusal to consider the issue is known only to this Court. In *Chestnut*, however, the petitioners had not been indicted by the alleged improperly selected grand jury (only held in contempt thereof); Epton was indicted by that grand jury. All of the Chestnut petitioners had completed service of their sentences; Epton has six months to serve in prison if this Court refuses to act.

2. *Was the petitioner's conviction totally unsupported by evidence, thereby depriving him of due process?* [Resp. Br. pp. 2, 31-35]

Although the specific criminal charges against petitioner were advocacy of the overthrow of the government of the State of New York by force and violence (anarchy) and conspiracy to advocate same and conspiracy to foment a riot "which disturbed the public peace," respondent justifies the conviction as comporting with the evidence "on the theory that [there was] evidence of a clear and present danger of violence [which] was required to support a verdict of guilty." [Resp. Br. p. 31]

In the ensuing discussion, supposedly supporting the sufficiency of the evidence against the petitioner on all counts, respondent makes no argument connecting any of the petitioner's actions either with riot or with the specific advocacy of the overthrow of the government of the State of New York. Respondent's presentation underlines the complete absence of any such proof.

The presentation is aimed exclusively at petitioner's intentions rather than actions, which intentions are manifested exclusively in his speech and pamphleteering. Viz.:

"he organized a group . . . which he *hoped* to 'mobilize' against the police." [Resp. Br. p. 32]

"Though the people he addressed . . . dispersed peacefully, petitioner's *wish* to see violence . . ." [Resp. Br. p. 32]

"Publicly, he and his organization continuously issued and circulated leaflets *inspiring* hatred of the police . . ." [Resp. Br. p. 33]

"In a speech . . . petitioner told his heated audience he *wanted* 'to organize the people of Harlem . . . in a military manner' . . ." [Resp. Br. p. 33]

"He *wanted* the fighting so intensified that the state militia would be called into action." [Resp. Br. p. 33]

"Epton *planned* and *publicized* another street demonstration . . ." [Resp. Br. p. 33]

". . . he *sought* and *expected* to cause the outbreak of more street violence." [Resp. Br. p. 34]

"*The evil of petitioner's intent* . . ." [Resp. Br. p. 34]

"Having missed the first opportunity to take command of a riot, Epton *wanted* to try again." [Resp. Br. p. 34] (*Italics* supplied in excerpts above.)

Respondent's analysis thus clearly demonstrates the insubstantial basis for petitioner's criminal conviction. It explains also why the state found it necessary to amend the conspiracy to riot count of the indictment at the end of the case in order to allege that Epton *intended* to cause a riot, even though a grand jury had lodged an indictment which described his acts of conspiracy as actually having effectuated a riot [see Pet. pp. 16-17].

Moreover it was the same alleged evil intentions of the defendant in connection with the riot that formed the basis (at least in the opinion of the New York Court of Appeals) for his conviction for anarchy [see Pet. 45a, 46a]. Thus, in that opinion, the discussion of "clear and present danger," a supposed *sine qua non* of a conviction for anarchy, is really concerned with riot only. The "clear and present danger" is not that of the overthrow of the government of the State of New York but only the dangers associated with the Harlem riot to which petitioner was attached by nothing more than his expression of his feelings at the time, and not expressed where any acts of riot were taking place.

No matter how parsed, there was simply no evidence that petitioner violated any law as described in the indictment under which he was brought to trial. [See 58a-64a]

3. *Since this Court, in dismissing petitioner's appeal in 1968 on the same record as here, has already either upheld the New York anarchy statutes or determined that their validity should not be reviewed because of the concurrent sentence doctrine, should it now pass upon them in the absence of new facts or law?* [Resp. Br. pp. 2, 35-37]

Respondent maintains that *Benton* v. *Maryland,* 395 U.S. 784 (1969) viewed together with this Court's refusal to review in *Burton* v. *New York,* 402 U.S. 991 (1971) underlines the continuing validity of the concurrent sentence bar to review. It is here submitted that the importance of the issues plus the fact that the anarchy felony conviction rides on a concurrent sentence with the misdemeanor conspiracy conviction [for conspiracy to riot] presents even more compelling reason for this Court to review than was presented to the Court in *Benton* v. *Maryland.*

4. *Are New York's criminal anarchy statutes violative of freedom of speech or unduly vague?* [Resp. Br. pp. 2, 49-51]

Under this heading, respondent goes further than the New York Court of Appeals in arguing the present validity and constitutionality of Penal Law §§160, 161. That court stated:

> "We are thus presented with a statute which is unconstitutional as interpreted. The dissent contends that our decision in *Gitlow* reflects the legislature's intent to make unlawful the mere advocacy of violent revolution, and that we are bound by our prior decision under the doctrine of *stare decisis*. We cannot agree." [Pet. 44a]

Respondent asserts without foundation that the "clear and present danger" doctrine expressly rejected in *Gitlow* had to be read into the state statutes after *Dennis* v. *United States,* 341 U.S. 494 (1951) and *Yates* v. *United States,* 354 U.S. 298 (1951) as a "judicial measure of constitutional applicability." In this argument respondent adopts the arguments of Judge Friendly in *Samuels* v. *Mackell,* 288 F. Supp. 348, expressly not approved by this Court (see 401 U.S. 66 at 73). Moreover, it is hard, except by extreme casuistry, to accept the holding of the New York Court of Appeals in *Epton* after the express language in *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967), holding the definition of anarchy there expressed to be void for vagueness.

5. *Are New York's statutes prohibiting conspiracy to commit the crime of riot constitutionally inapplicable to speech, in circumstances of clear and present danger of violence?* [Resp. Br. pp. 2, 46-49]

It is true that the New York Court of Appeals found that there was a "clear and present danger" of riot [Pet. 46a] even though it could not and did not find there was a "clear and present danger" of the overthrow of the government of the State of New York. Nonetheless there is no record evidence connecting petitioner to acts (even of speech, if speech is an act) of conspiracy to riot which "disturbed the public peace" as alleged in the indictment or even to incite riot as loosely used by the state Court of Appeals.

In this connection, when Mr. Justice Stewart commented in a footnote on the "proof" presented by the state in *Epton* v. *New York,* 390 U.S. 29-30, he was misled as to the actual state of the trial record, which showed absolute failure of proof of facts to support the conspiracy to riot charge as originally framed by the grand jury and which showed that the trial court was compelled to reverse itself on a so-called Molotov cocktail leaflet [cited by Mr. Justice Stewart] which was prejudicially admitted into evidence and then later stricken because it could not be connected to the petitioner or his activities. [448, 452, 1022, 1036][2]

It is here submitted that even bad intentions must be protected by the First Amendment if unconnected at trial

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[2] The text which is most prejudicial if believed and connected to petitioner (which the prosecution failed to do) read:

> "Bulletin No. 1, July 1964. Harlem Freedom Fighters. How to make a Molotov cocktail. Instructions: Empty a Bottle. Fill with gasoline. Use rag as wick. Light rag. Toss and see them run." The leaflet depicted a picture of a bottle stopped with a rag [453].

with any substantial evidence and previously charged illegal activity.

6. *Was the petitioner unconstitutionally prejudiced by the trial court's amendment of the count charging conspiracy to riot?* [Resp. Br. pp. 2, 49-51]

The importance and the prejudice to petitioner of the illegal amendment of the indictment at the end of the entire case has been argued at length above [pp. 4, 7 *supra*]. Nonetheless, respondent refers to the objection by counsel at trial to that amendment as "frivolous" [Resp. Br. p. 50]. Moreover, even though the trial court was compelled to amend the indictment, evidently because defense counsel had successfully argued the failure of evidence to support the indictment as drafted, respondent states

> "The petitioner, at the time, made no claim that this change in any way affected the presentation of his case . . . nor does he do so in his present brief." [Resp. Br. p. 50]

This is simply not true. Said counsel for the petitioner at the trial in making the motion to dismiss the conspiracy to riot count at the end of the case:

> "I submit, your honor, that on the basis of your disposition of count 2,[3] namely that there was no proof that the defendant aided or abetted anyone, and indeed there was no proof he had anything to do with the riot, I fail to see how this charge could be sustained." [1676]

* * * * *

[3] Count 2 was the substantive riot count framed in identical language as was the conspiracy to riot count and dismissed by the Court at the end of the prosecution's case for failure of proof.

The Court: The theory of the People's case never was, as I found out belatedly, an active participation on the riot scene itself.

Mr. Katz: That is quite true, but to use as your Honor puts it, the qualifying phrase: by instigating, promoting, aiding and abetting. I don't think we can overlook the following qualifying phrase which does not qualify it at all, but describes a completed offense.

The Court: I am going to read that language as if it said "which would disturb" because that's the only way it makes sense.

Mr. Katz: It may be the only way it makes sense, but this is not what the grand jury indicted this defendant for.

The Court: I think it indicates the intention of the grand jury." [1678, 1679]

• • • • •

The Court: I think Mr. Phillips would be content with your description that they met, they spoke and they leaflet [*sic*].

Mr. Katz: All right, but this is a protected activity under the First Amendment, and I do not think a conviction can be had on such a basis. I know it cannot be had—it would be violative of the First Amendment rights. [1681]

Nor was this a mere failure of proof as to one or more overt acts charged in the indictment. Rather it was a failure of proof as to the crime charged in the indictment.

The "trial judge's verbal change" was an amendment to the indictment made the only way an indictment can be amended—verbally.

No defendant in a criminal case needs or should be subjected to this manner of clarification of issues, else due process becomes a meaningless concept.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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